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No. 1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF WILLIAMSPORT, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Pennsylvania

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

City of Williamsport, Borough of Renovo, Borough of Milton, and City of Lock Haven, Pennsylvania, City of Buffalo, New York, and Co-operative Legislative Committee, Railroad Brotherhoods in Pennsylvania appeal from the order of the United States District Court for the Middle District of Pennsylvania, entered March 4, 1968, dismissing appellants' complaint seeking to set aside and to permanently enjoin findings, decisions and orders of the Interstate Commerce Commission (Commission), dated May 3 and July 6, 1967, concerning the "partial" discontinuance of Pennsylvania New York

Central Transportation Company (Penn Central)[1] passenger trains No. 570 (southbound) and No. 571 (northbound) between Buffalo, N.Y. and Baltimore, Md. (395 miles).

The Commission's findings and order of May 3, 1967, affirmed by the court below, were that the operation of the trains between Buffalo, N.Y. and Harrisburg, Pa. (312 miles) would (a) unduly burden interstate commerce and (b) is not required by public convenience and necessity; however, operation between Harrisburg, Pa. and Baltimore, Md. (83 miles) would (a) not unduly burden interstate commerce and (b) is required by public convenience and necessity; the southern segment of the train was ordered continued for the one year statutory period, and the investigation discontinued.

The Commission's order of July 6, 1967, affirmed by the court below, denied five petitions for reconsideration of the May 3 findings and order, revised a subsidiary finding concerning financial operations between Buffalo, N.Y. and Harrisburg, Pa., and provided that its order of May 3 would become effective August 3, 1967.

OPINIONS BELOW

The three-judge United States District Court for the Middle District of Pennsylvania issued two opinions. The first was entered July 20, 1967, and is reported at *City of Williamsport* v. *United States*, 273 F. Supp. 899. That opinion deals with the question whether Congress conferred the power of judicial review over findings, decisions and orders entered by the Interstate Commerce Commission after investigation, suspension,

[1] Appellee Penn Central is the successor to The Pennsylvania Railroad Company, effective February 1, 1968.

hearing and decision, concerning the discontinuance of interstate passenger trains, in whole or in part, pursuant to section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)), and whether injunctive relief would lie pending issuance of an administratively final order by the agency.

The second opinion, on the merits of the case, was made March 4, 1968, and is not yet reported. The opinion and order are set forth herein as Appendix B.

The reports and orders of the Interstate Commerce Commission, dated May 3 and July 6, 1967, were entered in its Finance Docket No. 24398, *Pennsylvania Railroad Company Discontinuance of Trains Nos. 570 and 571 Between Buffalo, N.Y. and Baltimore, Md.* Both were made by Division 3 of the Commission, and are not yet reported. These reports and orders, together with the dissent of Commissioner Virginia Mae Brown, are set forth herein as Appendix C and Appendix D.

JURISDICTION

This suit was brought in the three-judge district court pursuant to 28 U.S.C. §§ 1336(a), 1398(a), 2284, 2321-25; 5 U.S.C. § 702; and 49 U.S.C. § 17(9), to annul and set aside findings, decisions and orders of the Interstate Commerce Commission entered under 49 U.S.C. § 13a(1), dated May 3 and July 6, 1967, and to obtain injunctive relief. The complaint was filed May 15, 1967, and amended subsequent to the July 6, 1967 order on reconsideration of the Commission, Division 3.

The order and judgment of the district court dismissing the complaint was entered March 4, 1968.

Notice of appeal was filed in the district court for the Middle District of Pennsylvania on May 2, 1968.

Jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). Jurisdiction specifically for interstate trains under 49 U.S.C. § 13a(1) is sustained by *State of Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80, 83-84 (D.C. Vt. 1967), *City of Williamsport* v. *United States*, 273 F. Supp. 899, 901-3 (M.D. Pa. 1967), and *Public Service Board of State of Vermont* v. *United States*, 87 S. Ct. 3 (Harlan, J. 1966).[2]

STATUTE INVOLVED

The statute involved in this case is Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1), enacted August 12, 1958, 72 Stat. 571, and is set forth in Appendix A herein.

QUESTIONS PRESENTED

Where a railroad, pursuant to 49 U.S.C. § 13a(1), elects to oust the jurisdiction of two or more states over an interstate passenger train, by the act of posting and serving notices of a proposed interstate passenger train discontinuance,

1. Must the Interstate Commerce Commission, after investigation, suspension, hearing and decision, enter statutory findings concerning the proposed discontinuance (whether in whole or in part) set forth in the carrier's notice invoking federal jurisdiction?

2. Is the Interstate Commerce Commission, after investigation, suspension, hearing and decision, empowered to order the continued operation of the passenger

[2] Contra: *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D.C. Minn. 1965) and *State of New Hampshire* v. *Boston & Maine Corp.*, 251 F. Supp. 421 (D.C. N.H. 1965).

train, in part, where the jurisdictional notice proposes discontinuance of the entire passenger train,

(a) absent findings on the entire operation of the train?

(b) with findings on the entire operation of the train?

3. Is the Commission, after investigation, suspension, hearing and decision, in all instances required to enter findings on the entire operation of the train, irrespective of the content of the jurisdictional notice?

4. If the Commission renders findings only on segments of an interstate passenger train, is it nevertheless obligated to consider the impact of the discontinuance of one segment upon the viability of continued operation over the remaining segments?

5. Does the Commission, upon completion of scheduled field hearings at which public witnesses testified concerning the proposed discontinuance of an entire train, and thereafter holds further hearings concerning the partial discontinuance of the same train without affording the public a realistic opportunity to testify concerning such partial discontinuance, accord the parties the fair hearing required of administrative proceedings, with due regard for the four month statutory period required by 49 U.S.C. § 13a(1)?

STATEMENT

This is an appeal taken by five communities and a labor organization from the final order of the district court for the Middle District of Pennsylvania, dismissing their complaint, and which affirmed the decision of the Commission to permit Penn Central to effectuate a partial discontinuance of its final two day-

light trains, one operating daily in each direction between Buffalo, N.Y. and Baltimore, Md.

The Commission segmented the train, and permitted discontinuance of the 312-mile run between Buffalo, N.Y. and Harrisburg, Pa., while requiring the continued operation of the 83-mile run between Harrisburg, Pa. and Baltimore, Md.

1. The Commission's Decision of May 3, 1967

By the act of filing and posting notices on December 7, 1966, Penn Central invoked the statutory provisions of section 13a(1) of the Interstate Commerce Act that it would discontinue its Buffalo-Baltimore daylight passenger trains for their entire operation between Buffalo and Baltimore. The notice and filing ousted state jurisdiction over these trains by the terms of the statute, and conferred exclusive jurisdiction upon the Interstate Commerce Commission.

Upon receipt of numerous protests, the Commission, on January 3, 1967, entered upon an investigation of the proposed discontinuance specified in the railroad's notice, and in the same order required that the trains be continued in operation pending hearing and decision in such investigation. The order instituting the investigation is set forth herein as Appendix E.

On January 13, 1967, the Commission ordered that hearings in its investigation be held at Harrisburg and Williamsport, Pa., and at Olean and Buffalo, N.Y. At the conclusion of the hearings, at Buffalo, Penn Central offered its rebuttal case. The carrier's principal accounting witness thereupon presented data showing that, under the traditional accounting formula employed by the Commission in train-off cases, the

subject trains were operating at a profit.[3] The railroad then proceeded to distribute exhibits purporting to show that the *partial* operation of the daylight trains, *between Buffalo, N.Y. and Harrisburg, Pa.,* was being operated at a loss.

The hearing examiner adjourned the hearing to Washington, D.C., and permitted protestants one week to prepare cross-examination of this new Penn Central case for a partial discontinuance of the trains. Protestants appealed the ruling of the hearing examiner, but were overruled by the Commission on March 3, 1967. This order is set forth herein as Appendix F. The ensuing hearings at Washington, D.C. were solely concerned with cost accounting for the undue burden issue; the location of the further hearings at Washington, D.C., and the four month statutory period, precluded public testimony on the question whether the public convenience and necessity permitted a *partial* discontinuance of the trains over the Buffalo-Harrisburg (northern) segment.

By report and order dated May 3, served May 12, 1967, Division 3 of the Commission, by a two-to-one vote, found that operation of the trains between Buffalo-Harrisburg (northern segment) would (a) unduly burden interstate commerce, and (b) is not required by public convenience and necessity, but that operation between Harrisburg-Baltimore (southern segment) would (a) not unduly burden interstate commerce and (b) is required by public convenience and necessity. An order was entered requiring continued operation of the southern segment for the statutory one year period,

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[3] Penn Central has throughout expressed strong disagreement with this formula.

and discontinuing the investigation. Commissioner Virginia Mae Brown dissented, stating, "I do not intend to be ruled by the tyranny of figures when evaluating the public interest." (App. C, pp. 30a-33a)

No findings were made concerning the discontinuance proposed by the carrier's notice, as to which the public addressed its testimony in opposition, i.e., whether the entire operation between Buffalo and Baltimore would (a) unduly burden interstate commerce, and (b) is required by public convenience and necessity.

The majority opinion of the Commission's Division 3 relied heavily upon the financial analysis of the train service. It made separate analyses for the entire run (Buffalo-Baltimore), the nothern segment (Buffalo-Harrisburg), and the southern segment (Harrisburg-Baltimore). It found savable losses for all three, and adopted Penn Central's position that "feeder revenue . . . is in no sense revenue earned by trains 570 and 571 which should be included in the revenue of trains 570 and 571. (App. C, p. 21a)

Appellants, joined by 12 additional plaintiffs, brought suit immediately in the court below upon the issuance of the May 3, 1967 report and order. A temporary restraining order was issued, and continued, pending disposition of appellants' petitions for reconsideration of the May 3, 1967 decision and order. *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M.D. Pa. 1967).

2. The Commission's Order of July 6, 1967 on Reconsideration

Appellants timely petitioned for reconsideration of the May 3, 1967 decision and order. When feeder value is considered, which is a pro rata share of the joint

revenue, less expense, for through passengers and traffic interchanged with other Penn Central trains, appellants contended that by the very figures of Penn Central, the trains were indisputably operating at a profit over the entire run. Further, appellants pointed out that of the 43 witnesses testifying in support of the continued operation of the entire run of the trains, 42 of these were concerned with operation north of Harrisburg, rather than with the southern segment ordered to be continued by the Commission.

By order dated July 6, 1967, Division 3 of the Commission, acting as an Appellate Division, revised its prior finding of a $355,779 deficit for the northern segment. The deficit was reduced to $233,755 by the inclusion of $122,024 in feeder value attributable to the northern segment, thus reversing the prior report which had excluded such revenue. Division 3 did not, however, revise its financial analysis for the entire run from Buffalo to Baltimore by also including feeder revenue attributable to the entire train, which appellants had contended would result in a profitable showing for the entire run in the amount of $17,402, upon the very same figures used to allocate feeder revenue for the northern segment, nor were any other findings of the May 3, 1967 report disturbed upon reconsideration. (App. D, pp. 38a-40a)

The order of July 6, 1967 became effective August 3, 1967 by its terms. On that date the court below declined to continue its temporary restraining order or to issue an interlocutory injunction. Operation of the trains between Buffalo, N.Y. and Harrisburg, Pa. was discontinued on or about August 4, 1967.

3. Opinion of the Court Below

The gravamen of appellants' complaint seeking restoration of the through train service was that the Commission is required to make the two statutory findings for the entire discontinuance proposed by the carrier's notice, and for the train involved in such notice. Appellants also contend that the words "in whole or in part", set forth in the ordering power of section 13a(1), must be read to refer to the situation where a carrier's jurisdictional notice called for the partial discontinuance of a train. The district court's opinion rejected both views. It held that appellants' construction of the statute would "penalize the railroad for seeking to discontinue more of the operation than the Commission ultimately decided it was proper to do" (App. B, p. 7a), and that it saw "no reason to disturb the findings and Order of the Commission." (App. B, p. 8a)

There is no dispute as to the essential facts. The entire run is profitable based upon the customary accounting practices of the Commission in train-off cases, and employed by the Commission for the northern segment in its order on reconsideration. Defendants in the court below relied upon the proposition that it need not make findings governing the entire run of the trains.

The district court held that the agency may order the partial continuance of a segment of a train, even though the carrier's notice provided for an entire discontinuance. The court then turned to the findings made for the northern and for the southern segments, and found no prejudicial error to appellants. The court upheld the power of the Commission, where it requires continuance of a lesser amount than sought to be dis-

continued, to avoid the rendition of "appropriate statutory findings" governing the discontinuance proposed by the carrier's notice, or for the entire train, since it would appear that Congress so intended because the statute permits a railroad to discontinue an entire train absent an affirmative order of the Commission. (App. B, p. 6a)

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This is the first appeal brought to this Court since enactment of section 13a(1) of the Interstate Commerce Act in 1958, where the Commission actually entered into an investigation, held hearings, and issued a decision involving an interstate passenger train.[4] This is thus the first opportunity for the Court to examine the actual administration of the statute by the Commission, and where a *profitable* train service has been broken into segments. A large number of proceedings recently have been instituted by the railroads under the interstate provisions of the 1958 passenger discontinuance law, whereas previously primary attention has been directed to the intrastate provisions contained in section 13a(2).[5]

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[4] This court affirmed the action of a district court that upheld the exclusive discretion of the Commission to decline to enter upon an investigation into a proposed discontinuance of interstate ferry boats. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J. 1958), aff'd *per curiam*, 359 U.S. 27 (1959), and the court denied certiorari for a judgment dismissing a state's challenge to the constitutionality of section 13a(1) where the Commission also declined to institute an investigation. *Pennsylvania Railroad Company* v. *Sharfsin*, 369 F. 2d 276 (3rd Cir. 1966), cert. den. 386 U.S. 982, rehearing den. 386 U.S. 1043 (1967). See also *Sludden* v. *United States*, 211 F. Supp. 150 (M.D.Pa. 1962).

[5] *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963); *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964).

The large number of passenger train discontinuances occurring throughout the nation are not being effectuated by findings concerning the actual train service. Rather, the technique seized upon by the railroad industry, and adopted by the Commission, is the "partial" discontinuance whereby a train is broken up into segments for the purpose of findings and orders by the regulatory agency. Once a segment is thus discontinued, the entire train soon collapses, as demonstrated by Appendix G hereto.

Appendix G shows that during the full year 1967 and the first four months of 1968,[6] 134 trains were litigated before the Commission. Almost one-half of these trains, or 64, were notices proposing a partial discontinuance; and of the 70 trains for which a complete discontinuance was sought, 9 were permitted to be partially discontinued. The Commission denied discontinuance for only 6 percent of the partial discontinuances, thus granting relief to the carriers for 94 percent of the trains, and demonstrating that the public is at an extreme disadvantage where a railroad is able to focus only upon a segment of a train's run.[7] And in none of such cases did the Commission ultimately render the statutory findings as to whether the train is

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[6] The period Jan. 1, 1967-April 30, 1968 was selected since the current flood of interstate discontinuance cases under section 13a(1) did not reach the Commission for decision until the first quarter of 1967. See No. 34733, *Adequacies-Passenger Service-Southern Pacific Company Between California and Louisiana,* recommended report of examiner John S. Messer, served April 22, 1968, pp. 23-24.

[7] The Commission denied discontinuance for 20 percent of the trains sought to be discontinued in their entirety. For all train discontinuances, both partial and total, 13 percent were denied and 87 percent were permitted to become effective.

needed by the public or that continued operation would unduly burden interstate commerce.

This appeal thus involves issues of paramount national importance to the travelling public and to the economic viability of smaller communities. The slaughter of *profitable* passenger trains, as here, is being accomplished throughout the Nation by the technique of the partial discontinuance, in defiance of the clear wording of the statute and Congressional policy. The March 4, 1968 opinion of the court below, which further broadens the powers of the Commission in this regard, has already been seized upon by the Commission as a green light for the clear track ahead. *Chicago, B. & Q. R. Co. Discontinuance of Trains,* 331 I.C.C. 813, 827 (April 2, 1968).

I. Findings Are Required for the Entire Train

The court below held that the jurisdictional notice proviso, whereby a carrier may apply to discontinue a train, "in whole or in part", is not so interrelated with the ordering proviso, "in whole or in part", as to preclude the agency from ordering a partial continuance where a complete discontinuance was sought. The court below stated:

> "After the hearing in such investigation has been concluded, the Commission after appropriate statutory findings are made, may 'require the continuance or restoration of operation or service of such train or ferry, *in whole or in part,* for a period not to exceed one year from the date of such order.' (emphasis supplied)" (App. B, p. 6a)

The court below erred in holding that the above "appropriate statutory findings" requirement is satisfied

by the rendition of findings only with respect to various segments, rather than with respect to the train in its entirety, for the statute reads:

> "If . . . . , the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, . . ."

There is no limiting phrase, *in whole or in part,* to the statutory findings prerequisite for the entry of an order requiring continuance, *in whole or in part.* It is only after the entry of the required findings that the Commission may issue any order requiring continuance, in whole or in part. Further, the Commission's findings did not embrace the interrelationship of one segment to the other. As noted by the dissent of Commissioner Virginia Mae Brown, the decision as to one segment impairs the success of the other segment, as well as the viability of main-line trains passing through Harrisburg. (App. C., p. 33a)

II. The Opinion of the Court Below Is Inconsistent With the Proposition That Findings of the Commission in Train-Off Cases Are Subject To Judicial Review.

The thrust of appellants' attack against the Commission in the court below was that the agency failed to find whether the Buffalo-Baltimore trains, considered for their entire runs, would unduly burden interstate commerce or are required by public convenience and necessity. The Commission made separate statutory findings for the northern segment and for the southern segment, and reached opposite findings as to each segment. Yet the whole is greater than the sum of the separate segments; as to the undue burden issue,

this is owing to the Commission's long-maintained feeder value formula and to the movement of commerce and passengers between the two segments; as to the public convenience and necessity issue, this is owing to the fact that many passengers travel between the two segments, as well as to and from each segment, on the one hand, and stations on the east-west main line between New York/Philadelphia and Chicago/St. Louis, on the other hand.

If the Commission is compelled to enter findings as to the entire discontinuance proposed by the carrier's notice, also required for the entire train by the terms of the statute, it would be compelled to find, based upon reaffirmation of the feeder revenue formula in its July 6, 1967 order on reconsideration, that the entire Buffalo-Baltimore runs were being operated at a profit.

If the court below is correct in its holding, on preliminary motions, that orders of the Commission denying reconsideration of decisions in train-off cases are subject to judicial review, it necessarily follows that the Commission is bound by the usual judicial review provisions of the Administrative Procedure Act, and must make the required statutory findings. 5 U.S.C. §§ 557, 706. Although the Commission did not issue an affirmative order permitting discontinuance, it did render an order denying reconsideration, and in any event the "negative order" doctrine is no longer guiding. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125 (1939). Accordingly, the Commission must enter findings concerning the discontinuance proposed in the carrier's jurisdictional notice, which was the discontinuance specifically made the subject of an investigation order, and which was assigned for hearing and decision. In short, the Commission must make quasi-

jurisdictional findings for the Buffalo-Baltimore trains if its decisions in interstate train-off cases are subject to judicial review.

The courts need not reach the question whether the Commission, after making the quasi-jurisdictional findings on the entire run may then proceed, as here, to enter findings concerning various segments. The Court's task is complete where the quasi-jurisdictional findings are absent. *Alabama G.S.R. Co.* v. *United States,* 340 U.S. 216, 227-28 (1951); *Florida* v. *United States,* 282 U.S. 194, 215 (1931); *United States* v. *B. & O. R. Co.,* 293 U.S. 454, 464-65 (1935).

The Commission, in its first reported case under section 13a(1), held that it was obligated to enter quasi-jurisdictional findings even when it concluded not to issue an order requiring continuance. *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59, 73-77 (1959), frequently cited in train-off decisions. The court below held that decisions under section 13a(1) are subject to judicial review, 273 F. Supp. at 901-2. Yet the court below inconsistently thereafter held that the agency need not make findings on the entire operation of the train, even though this was the "such discontinuance" that ousted the jurisdiction of New York, Pennsylvania and Maryland, even though the decision actually made by the Commission was to discontinue the through service provided by the trains, and despite the specific language of section 13a(1), quoted above, requiring findings on the entire operation of the train before the Commission may enter any order requiring continuance for the southern segment of the Buffalo-Baltimore trains.

The court below passed over the necessity for quasi-jurisdictional findings for the entire run (App. B, p. 8a):

> "The remaining points raised by plaintiffs go to the Commission's findings. The function of this Court is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing Court is without authority to intervene. *United States* v. *Pierce Auto Lines,* 327 U.S. 315 (1946)."

The absence of quasi-jurisdictional findings for the entire run of the trains cannot be excused for lack of prejudice, because the United States and Commission conceded below that the trains might be profitable over the entire run:

> "That the train might have been profitable as a whole—through feeder and other revenues earned on the Southern segment—does not detract from the Commission's power to allow discontinuance of the unprofitable Northern segment."

> "The statute reads 'in whole or in part'; the 'part' is not limited by any language requiring an unprofitable 'whole'."

With regard to the public convenience and necessity issue, the court below, in upholding the Commission's finding that the northern segment is not required by public convenience and necessity, could not by implication assume a similar finding for the entire operation of the train, since a review court must judge the propriety of agency action solely by the grounds invoked

by the agency. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). Moreover, the two statutory tests of undue burden and public convenience and necessity do not stand separate and apart, as noted by the Commission. (App. C, p. 28a) In construing section 13a(2), this Court held that the Commission is required to balance the two statutory tests, against each other, in reaching the ultimate decision. *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 105 (1964).

A basic error of the court below stems from its failure to follow the natural consequences of the rule that decisions of the Commission denying continuance of trains are subject to full judicial review by the public in the same manner as decisions requiring continuance at the suit of a railroad. *State of Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80, 83-84 (D.C. Vt. 1967); *City of Williamsport* v. *United States,* 273 F. Supp. 899, 901-3 (M.D. Pa. 1967); *Public Service Board of State of Vermont* v. *United States,* 87 S. Ct. 3 (Harlan, J. 1966).

III. Findings Are Required for the Discontinuance Proposed by the Jurisdictional Notice To Avoid Incongrous Results

As shown above, decisions in train-off cases are subject to judicial review, and statutory findings are required for a train in its entirety before the Commission can issue any order requiring continuance, in whole or in part. However, findings are also required for the discontinuance proposed by the carrier's notice to avoid incongruent results.

The Commission, and the court below, held that the jurisdictional notice proposing a discontinuance, in whole or in part, is not so interrelated with the ordering power of the statute, in whole or in part, as to re-

strict the Commission to the discontinuance specified in the jurisdictional notice. (App. B, p. 7a; App. D, p. 39a) But if such principle is operative where the carrier proposes a complete discontinuance, and the Commission renders findings for a partial continuance, then the relationship should apply in reverse; that is, if a carrier proposes a partial discontinuance, it would seem that the Commission, upon the theory of the court below, could enter findings for an entire discontinuance and thereupon issue an order requiring continuance of the entire train for a one year period. Certainly the court below did not intend such a result, but it logically follows from the opinion.

An alternative statutory construction, not without support in the legislative history, would be that the "in whole or in part" language of the jurisdictional proviso refers not to the "discontinuance", but to the "rights" of the carrier mentioned in the first sentence of section 13a(1). Under such a construction, the carrier could not propose a piecemeal discontinuance, but would in all instances be required to subject the entire train to federal jurisdiction if it elected to proceed under the statute. The agency findings would thereupon be required for the entire train prior to any additional findings as to segments, and to the issuance of orders relating to segments.

Accordingly, under any acceptable construction of the statute, findings are required on the discontinuance proposed by the jurisdictional notice. Indeed, it is the jurisdictional notice by which state authority is superseded.

CONCLUSION

It is submitted that the decision of the court below fails to recognize that the Interstate Commerce Commission is under a duty to render findings on the entire run of a passenger train, and is under a special duty to do so when such train is actually proposed to be discontinued in its entirety. The questions presented by this appeal are substantial, are of immediate public importance, and require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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May 1968

APPENDIX A

Interstate Commerce Act. Title 49, United States Code:

Section 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change: The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but do not for a longer period than four

months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 9996 CIVIL

CITY OF WILLIAMSPORT, ET AL., *Plaintiffs*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE PENNSYLVANIA RAILROAD COMPANY, *Defendants*

Before: FREEDMAN, *Circuit Judge*, and SHERIDAN and NEALON, *District Judges*

Opinion of the Court

(Filed March 4, 1968)

By NEALON, *District Judge*

In this case, defendant railroad, pursuant to the provisions of Section 13a(1)[1] of the Interstate Commerce Act,

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[1] 49 U.S.C.A. § 13a(1) provides:

"(1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor or each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or changes. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any

filed a notice of discontinuance of its passenger trains Nos. 570 and 571 between Buffalo, New York, and Baltimore, Maryland. An investigation was ordered by the Interstate Commerce Commission (Commission) and numerous hearings were held. At the conclusion thereof, defendant was directed to continue operation of both trains between Baltimore and Harrisburg, Pennsylvania, the Northern

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State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice, the Commission shall have authority during said thirty days notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers."

segment, for one year, but was permitted to discontinue operation of these trains between Harrisburg and Buffalo, the Southern segment. Plaintiffs filed this action requesting the Court to enjoin and set aside the Order of the Commission and to order defendant to restore full service of its trains 570 and 571.[2]

As we view this proceeding, the principal issue in the case is whether the Commission had the authority to require operation of both trains in part, from Baltimore to Harrisburg, thus allowing discontinuance of the remaining portion between Harrisburg and Buffalo. Defendant contends that Section 13a(1) authorizes the action taken by the Commission in this case, while plaintiffs argue that "(t)he ordering language of section 13a(1) permits continuance, *in whole or in part,* but such partial continuance is dependant upon the original notice invoking jurisdiction having requested a partial discontinuance." Specifically, plaintiffs assert "(a)bsent proper notice, the I.C.C. is without power to order a partial continuance or to permit a partial discontinuance because any order must be based upon findings, and the findings required to be made by section 13a(1) are specifically tied down to such *discontinuance* as is contained in the notice and made the subject of the investigation."

Section 13a was enacted by Congress as part of the Transportation Act of 1958. The legislative history of that Act reveals Congress' concern about the financial plight of railroads, attributable in part to the losses sustained in operating passenger trains. To discontinue these trains before the enactment of § 13a, the railroads were required in all cases to seek authority from each of the States served. See 104 Cong. Rec. 10842-10843, 10851. Without concurrence of all the States affected, the railroad might be compelled to continue operations despite serious losses.

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[2] The parties were before this Court previously on preliminary matters. See 273 F. Supp. 899 (1967).

New Jersey v. New York, Susquehanna & Western Railroad Co., 372 U.S. 1 (1963). The purpose of Congress in enacting Section 13a(1) was remedial[3] and this statute gave a railroad the right to discontinue interstate passenger trains by serving a notice and supporting statement on the Commission and by posting notices in the trains and stations involved. In addition, notices and statements were to be served on the Governors and the appropriate regulatory agencies of each State. Within thirty days of notice, the Commission has the authority to enter upon an investigation of such discontinuance or change. If the Commission decides not to investigate, then the railroad may discontinue the trains as of the date designated in the notice. See State of New Jersey v. United States, 168 F. Supp. 324 (1958), affirmed 359 U.S. 27 (1959). If the Commission decides to investigate the proposed discontinuance, then the Commission may require ". . . such train or ferry to be continued in operation or service, *in whole or in part*, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective." (Emphasis supplied) After the hearing in such investigation has been concluded, the Commission after appropriate statutory findings are made, may ". . . require the continuance or restoration of operation or service of such train or ferry, *in whole or in part*, for a period not to exceed one year from the date of such order." (Emphasis supplied) Thus, recognizing that under the statute a railroad is free to discontinue the operation or service absent an affirmative order of the Commission, it would appear that Congress intended to confer authority on the Commission to order a partial continuance even though the railroad sought to discontinue the whole run from point of origin to point of termination. This has been the interpretation of the Commission in prior

[3] See New Jersey v. New York, Susquehanna & Western Railroad Co. (supra).

cases,[4] and such interpretation by the agency charged with the administration of the statute is entitled to great weight. Levinson v. Spector Motor Co., 330 U.S. 649 (1947). What the Commission did in the case before us was to order the continuance of the operation of the trains between Harrisburg and Baltimore, while, at the same time, allowing the discontinuance of the operation between Harrisburg and Buffalo which, in effect, required continuance "in part" of the operation sought to be discontinued.[5] The contention that the Commission is restricted to the discontinuance sought in the original notice and cannot order a partial continuance is untenable. This would place the Commission in an administrative strait-jacket and would not comport with the statutory purpose. Its effect would be to penalize the railroad for seeking to discontinue more of the operation than the Commission ultimately decided it was proper to do. There is nothing in the statute or legislative history suggesting such a limitation. As was pointed out in People of the State of California v. United States, 258 F. Supp. 950, 954 (N.D. Cal. 1966), a train discontinuance case under 13a(1):

> "We see no reason for imposing an illogical restriction—one which is at odds with the purpose of Congress—upon a statute which was deliberately drawn in broad and flexible terms."

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[4] See New York Central R. Co. Discontinuance of Service, 307 I.C.C. 167, 171 (1959); Louisville & Nashville R. Co. Discontinuance of Service, 307 I.C.C. 173, 186 (1959); Chicago, M. St. P. & P. R. Co. Discontinuance of Passenger Train Service, 317 I.C.C. 691, 715-716 (1961); Boston & Maine Corp. Discontinuance of Passenger Train Service, 324 I.C.C. 418, 445-446 (1965).

[5] The partial discontinuance between Harrisburg and Buffalo concerned an interstate operation and remained a matter for 13a(1) cognizance.

Moreover, plaintiffs cannot assert prejudice as they were afforded adequate opportunity to oppose the partial discontinuance between Harrisburg and Buffalo.[6]

The remaining points raised by plaintiffs go to the Commission's findings. The function of this Court is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing Court is without authority to intervene. *United States* v. *Pierce Auto Lines,* 327 U.S. 515 (1946). We see no reason to disturb the findings and Order of the Commission. The complaint will be dismissed.

Order

Now, March 4, 1968, in accordance with the Opinion this day filed, plaintiffs' complaint is dismissed and the Clerk is hereby directed to enter judgment dismissing said complaint.

By the Court

/s/ William J. Nealon
District Judge

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[6] The proceedings began by notice filed with the Commission on December 7, 1966, wherein the railroad proposed discontinuance of the entire run under Section 13a(1). On January 3, 1967, the Commission instituted an investigation and required the carrier to continue operating the trains for the maximum four-month period authorized by statute. A total of ten days of hearings were held in Harrisburg, Pennsylvania; Williamsport, Pennsylvania; Olean, New York; Buffalo, New York and Washington, D. C. These hearings consumed over 1200 pages of transcript and involved over 50 exhibits. The division of the operation into Buffalo-Harrisburg and Harrisburg-Baltimore segments was first considered at a hearing held February 24, 1967. Plaintiffs were given a one-week continuance to March 3, 1967, in order to prepare evidence relating to the Northern segment. Testimony on this aspect of the case was taken March 3, 6, 7, and 15, 1967. On May 12, 1967, the Division issued its report, finding that the Northern segment might be discontinued while the Southern segment should be continued.

Judgment

This action came on for hearing before the Court, Honorable Abraham L. Freedman, United States Circuit Judge, and Honorable Michael H. Sheridan and William J. Nealon, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered, and Adjudged that the complaint, in the captioned case, be and it hereby is dismissed.

[Filed March 4, 1968]

T. H. CAMPION, *Clerk*

PER .....
Deputy Clerk

Dated at Scranton, Pa., this 4th day of March, 1968.

T. H. CAMPION
T. H. Campion
Clerk of Court

APPENDIX C

(Service Date May 12, 1967)

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 24398

PENNSYLVANIA RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 570 AND 571 BETWEEN BUFFALO, N. Y., AND BALTIMORE, MD.

Decided May 3, 1967

Upon investigation, found (a) that the operation by The Pennsylvania Railroad Company of its passenger trains Nos. 570 and 571 between Harrisburg, Pa., and Buffalo, N. Y., is not required by public convenience and necessity and the continued operation thereof will unduly burden interstate commerce; and (b) that the continued operation by said railroad of its passenger trains Nos. 570 and 571 between Baltimore, Md., and Harrisburg, Pa., is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, and such service is ordered continued for a period of 1 year from the date hereof. Investigation discontinued.

Donald A. Brinkworth for The Pennsylvania Railroad Company.

Walter E. Zullig, Jr., for the State Public Service Commission of New York; and *Joseph C. Bruno, Herbert E. Squires*, and *Morton Krase* for the Pennsylvania Public Utility Commission.

T. P. Shearer, Charles J. Sludden, A. H. Cole, Joseph P. Scanlon, and *Ben Krohn* for railway labor organizations.

Gordon P. MacDougall, Abraham I. Okun, Allen R. Brougham, Jr., Henry P. Perciballi, Samuel C. Ranck, Donald R. Bastian, John R. Moriarity, Eugene V. Allison, Sr., Jack E. Paulhamus, Ross B. Grenard, Jr., W. Max Bossert, Robert L. Goetz, Norval J. Remick, J. Fred Munro,

Frank L. Bowen, and *George Hamilton Forman,* for protestants.

Report of the Commission

DIVISION 3, COMMISSIONERS TUGGLE, BROWN AND DEASON

DEASON, *Commissioner:*

Pursuant to the provisions of Section 13a(1) of the Interstate Commerce Act, The Pennsylvania Railroad Company (Pennsylvania Railroad or Carrier) filed a notice on December 7, 1966, in which it proposed to discontinue, effective January 15, 1967, the operation of its passenger trains No. 570 (southbound) and No. 571 (northbound) between Buffalo, N. Y., and Baltimore, Md., a distance of approximately 395 miles. Until July 1, 1966, the southbound train on Saturday and Sunday and the northbound train on Sunday operated on slightly different schedules. The southbound trains were numbered 570 (daily except Saturday and Sunday), 576 (Saturday only), and 572 (Sunday only). The northbound trains were numbered 571 (daily except Sunday), and 573 (Sunday only). Except as may be required for clarity, these trains will be referred to as trains 570 and 571, as they are now operated. Copies of the notice were served and posted in the manner prescribed by Section 13a(1) of the act and the regulations of this Commission.

Upon consideration of petitions and letters of protest filed on behalf of individuals, business establishments, labor associations, community organizations, and regulatory commissions of affected states, an investigation of the proposed discontinuance of service was instituted by order of January 3, 1967. The order required continued operation of the trains for a period not exceeding four months beyond the date when the discontinuance would otherwise have become effective. Because of the statutory limitation upon the time available for investigation and decision, the order provided for the omission of a report and recommended order by the examiner and for certification of the

record to us for an initial decision. Hearings were held and briefs have been filed.

MOTION TO DISMISS

The Maryland Public Service Commission did not appear at the hearings to protest the proposed discontinuance. At approximately the date for the filing of briefs it filed a petition for dismissal of the proceedings with respect to the operation of the trains between Baltimore and Harrisburg. It is urged that the carrier failed to invoke the jurisdiction of the Commission under Section 13a(1). That position is based upon the contention that carrier's schedules advertise a through service between Baltimore and Pittsburgh, Pa., by trains 16 and 25 but that neither the posted notice nor the supporting statement disclosed that the proposed discontinuance involves the discontinuance of the "Washington/Baltimore sections" of trains 16 and 25 serving in both directions through Harrisburg between Pittsburgh and Baltimore. The petition asserts that the supporting statement does give notice to the Maryland commission that discontinuance would affect service between New York/Philadelphia and Buffalo.

A motion or petition to dismiss is not appropriate in a 13a(1) proceeding since an order requiring continuation of the service, or an order discontinuing the investigation, may be entered only after hearing and upon the requisite statutory findings. *St. Louis-San Francisco Railway Co. Discontinuance of Trains Nos. 3 and 4 Between St. Louis, Mo., and Oklahoma City, Okla.*, Finance Docket No. 23547, decided August 9, 1965 (not yet printed); and *Missouri Pacific Railroad Co. Discontinuance of Trains Nos. 11 and 12 Between St. Louis, Mo., and Pueblo, Colo.*, Finance Docket No. 23853, decided March 22, 1966 (not yet printed). The petition for dismissal is denied, and petitioner's position will be treated as an argument that the Commission should discontinue the investigation for lack of jurisdiction, and order continuance of the involved passenger operations.

Apparently petitioner urges that, in order to discharge its responsibility to the citizens of Maryland, petitioner must be notified in the posting notice or in the supporting statement that an "advertised through service" will be discontinued. The statutory requirements with which the carrier must comply to invoke the jurisdiction of this Commission through the proper posting of notice and the filing and serving of copies of the notice and the supporting statement are discussed in *Chicago, M. St. Paul & P. R. Co. Discontinuance of Trains,* 317 I.C.C. 761.

As described above and in the following section of this report, trains 570 and 571 operate south and north through Harrisburg. Trains 16 and 25 operate east and west between Pittsburgh and New York on the mainline, also operating through Harrisburg. Petitioner relies upon schedules which are in evidence for the contention that carrier advertises, in the New York, Philadelphia, Washington, and Baltimore to Pittsburgh schedule, and in the reverse direction schedule, a through service between Baltimore and Pittsburgh. In both directions the schedules of trains 16 and 25 show by an appropriate symbol and footnote that the service is provided by connecting trains and that passengers must change trains in Harrisburg. In *Missouri Pac. R. Co. Discontinuance of Trains,* 320 I.C.C. 383, 385, express-baggage and pullman cars were physically transferred to connecting trains. A similar contention was rejected in that case. The Commission held that statutory notice and posting requirements "are satisfied by the posting of notices at all of the stations, depots, or other facilities served by the specific trains involved in the proceeding in question." The same conclusion is warranted under the record in this proceeding. Petitioner acknowledged due service of copies of the notice and supporting statement upon the Governor and the regulatory commission of the State of Maryland. The notice and the supporting statement fully comply with Section 13a(1) and our regulations.

Description of trains—Among others, carrier operates a north-south line of railroad between Buffalo and Harrisburg, Pa., and between Harrisburg and Baltimore. At Harrisburg this line intersects the east-west main line serving Chicago, Ill., and St. Louis, Mo., on the west, Philadelphia, Pa., and New York, N. Y., on the east, and numerous intermediate points. Train 570, terminating at Baltimore, is the Baltimore Day Express; and train 571, terminating at Buffalo, is the Buffalo Day Express. Train 570 leaves Buffalo at 9:15 a.m. and arrives in Baltimore at 8:45 p.m.; and train 571 leaves Baltimore at 8:15 a.m. and arrives in Buffalo at 8:05 p.m. The train schedules and the points served are shown in Appendix A. Populations of the points served are shown in Appendix B.

Each train is powered by 2 diesel-electric locomotives. The consist of head-end equipment assigned to the trains varies according to the volume of traffic on different days of the week. The normal consist includes one 60-reclining-seat coach. Coaches are added as required for weekend and holiday traffic. Until August 26, 1966, when it was discontinued by the Post Office Department, the consist also included a Railway Post Office car six days a week.

With the exception of Buffalo, all of the stations along the route are owned and operated by carrier. At Buffalo the trains operate in and out of the New York Central Railroad terminal under a contract between Pennsylvania Railroad and New York Central.

Other passenger service—Carrier also operates a pair of overnight passenger trains between Baltimore and Buffalo. Train 574, the Southern Express, leaves Buffalo at 7:45 p.m. and arrives in Baltimore at 8:10 a.m. Train 575, the Northern Express, leaves Baltimore at 7:55 p.m. and arrives in Buffalo at 8:30 a.m. Train 554 southbound in the afternoon, and train 549 northbound in the evening, serve between Harrisburg and Baltimore. Carrier has not proposed any change in the services of those trains. Their schedules are included in Appendix A.

Effect on employees—Discontinuance of the trains would abolish the jobs of 19 on-train men; 6 enginemen and 3 trainmen between Buffalo and Renovo; 2 enginemen and 4 trainmen between Renovo and Harrisburg; and 2 enginemen and 2 trainmen between Harrisburg and Baltimore. These men would exercise their seniority. Because of a shortage of manpower, carrier does not anticipate that the bumping process will cause any train employee to lose employment. In the Williamsport district 15 men were hired for 1966 vacation work, of whom 5 quit and the other 10 are still employed. Carrier would abolish the jobs of 10 station employees who would not be required upon discontinuance of the trains.

Financial Data—Carrier's general balance sheet as of September 30, 1966, shows assets totaling $2,445.5 million, including current assets $228.2 million, special funds $25.3 million, investments $787 million, transportation property, less accrued depreciation and amortization of defense projects, $1,365.4 million, miscellaneous physical property, less accrued depreciation $12.3 million, and other assets $27.2 million. Liabilities consisted of current liabilities $172.9 million, long-term debt due within one year $52 million, long-term debt $611.7 million, reserves $32.8 million, other liabilities and deferred credits $153 million, capital stock $139.2 million, capital surplus $543.3 million, and retained earnings $740.5 million.

Income statements for 1964, 1965, and the first nine months of 1966 show, respectively, railway operating revenues of $873.2 million, $892.6 million, and $673.2 million; net railway operating income of $39.2 million, $45.5 million, and $42 million; and net income after fixed charges and interest $29.1 million, $33.9 million and $33.4 million.

Financial results of operation—Pennsylvania Railroad submitted exhibits designed to reflect the revenues, selected expenses, and financial results of operating trains 570 and 571 between Buffalo and Baltimore for the calendar years

1964 and 1965, the first 6 months of 1966, and the fiscal year July 1965 through June 1966 (fiscal 1966). The fiscal 1966 results were computed both with and without the RPO car in order to show the effect of discontinuance of the RPO car upon operating results. The exhibits show the following claimed losses, respectively: 1964 deficit $89,074, including RPO revenues $228,072; 1965 deficit $166,943, including RPO revenues $220,080; first half of 1966 deficit $101,285, including $107,124 RPO revenues; fiscal 1966 deficit $185,090, including RPO revenues $217,158; fiscal 1966, excluding RPO revenues and related expenses, deficit $320,134.

The claimed losses are stated here to show the progressive worsening of the financial results of operating the trains. The exhibits are not prepared on the out-of-pocket loss basis required by Commission decisions in 13a(1) proceedings, and would require revision in order to reflect results which would be acceptable to show out-of-pocket losses incurred. Other exhibits and extensive oral evidence at the hearings reflect the required adjustments. Those adjustments should have been made in the exhibits under the well-known out-of-pocket savings rules which are applicable, and would have avoided an undue amount of oral evidence at the hearings.

Revenues of $109,301 were received from the Post Office Department in fiscal 1966 to cover terminal mail-handling charges, and these were not considered in computing the above deficits. Adjusted for the portion of that revenue which carrier would continue to earn for handling retained mail traffic, the lost revenue would be $74,433. That figure is overstated, however, because it includes reimbursement for classification, switching, and other station services for which no offsetting expense has been shown or claimed, and because the above deficits do not account for a saving of $76,327 in wages of station employees whose positions would be abolished. The exhibits include $16,854 in joint facility expense for fiscal 1966, principally $16,500 in fixed rental, which cannot be saved, and from a comparison with the

figures for the other reporting periods approximately the same amount obviously was included there. These and other necessary adjustments have been made in the following restatement of fiscal 1966 results and pro forma results of operation.

Financial Results of Perations, Fiscal 1966. Adjusted to Exclude R.P.O. Car.

	Comparison of data to compute Harrisburg-Baltimore results	Baltimore-Buffalo	Harrisburg-Buffalo	Harrisburg-Baltimore
1	Revenues	789,010	554,133	234,877
2	Expense	1,171,307[1]	909,912[2]	261,395
3	Savable loss	382,297	355,779	26,518
	Pro Forma Result to System of Discontinuance			
4	Feeder revenue loss	156,480	63,666	92,814
5	Saved expense	225,817	292,113	(66,296)[3]
6	Other savable costs[4]	33,364	33,364	
7	Total savings	259,181	325,477	(66,296)[3]
	Pro Forma Results of Operations, Fiscal 1967, Based on 1966 Operations. Adjusted to Exclude R.P.O. Car, and at 1967 Levels of Revenue, Wages, and Costs.			
8	Terminal handling[5]	109,301	64,461	44,840
9	Express revenue[6]	11,479	7,502	3,977
10	Total rev. adjustment	120,780	71,963	48,817
11	Additional costs[7]	50,057	35,237	14,820
12	Added revenue	70,723	36,726	33,997
13	Savable loss, line 3 minus line 12	311,574	319,053	(7,479)[3]
14	Lost express rev.[8]	4,380	1,431	2,949
15	Total savings, line 7 minus line 14	254,801	324,046	(69,245)[3]

[1] Includes $76,327 savable station employee expense, $11,114 joint facility costs, and 2,690 injuries to persons.

[2] Includes $63,278 savable station employee expense, $11,114 joint facility costs, and 2,690 injuries to persons. No injuries to persons were claimed for the operations between Harrisburg and Baltimore.

[3] Loss to system.

[4] Saving for cost of time lost by track crews in clearing single track for trains 570 and 71.

[5] Terminal mail handling costs paid by the Post Office Department. This revenue was ot included in line 1 because it includes payment for loading, sorting, classification, switching, nd other station services.

[6] Added fiscal 1967 express revenue derived from increased rate per car foot mile.

[7] Increased 1967 costs of fuel, supplies, wages, and fringe benefits; and adjusted to xclude swing brakemen previously operating between Buffalo and Port Allegheny.

[8] Additional loss of feeder express revenue accruing from increased 1967 rate per car oot mile.

Passenger revenues were computed from one test week in each consecutive 2 months (January and February, March and April, etc.) in 1965 and the first 6 months of 1966. The above results used the 6 test weeks of fiscal 1966. The number of revenue passengers by class of fare (first class, coach, family plan, and furlough) and the total revenue by class was developed for the test weeks and used to arrive at an average rate per passenger over each of the 3 districts in the above table; and over carrier's lines west of Harrisburg, east of Harrisburg, and south of Baltimore for feeder revenues. These average rates were then applied to the total number of revenue passengers in each 2-month period for each of the 6 districts to arive at on-train and feeder revenues. Total passenger count was taken from a compilation of conductors' daily revenue passenger count by district. The test periods were reasonably representative and the methods used should result in a reasonably accurate statement of revenues.

Mail revenue is actual and was abstracted from records of charges against the Post Office Department. Mail is separately billed for each train, not for the total movement on carrier's railroad. Express revenue was computed by multiplying the actual car foot miles by the then current rate per car foot mile. Total car foot miles generated by each train are separately reported to the carrier by Railway Express Agency. In *Pennsylvania Railroad Company Discontinuance of Passenger Train Service between Buffalo, N. Y., and Harrisburg, Pa.*, Finance Docket No. 21986 (not printed) decided July 27, 1962 (prior case), carrier proposed to discontinue trains 570 and 571 north of Harrisburg. After investigation the Commission ordered the trains continued for a period of one year. Protestants attack the mail and express revenues in this proceeding principally based upon a comparison with revenues in the prior case, and based upon testimony that on occasions more mail and express cars were transported on the trains than are accounted for in the programmed consist of the trains. As

noted above the revenues reported are the actual revenues, computed from records of actual movements and revenues for each train, and would include any extra cars moved above the programmed consist.

Newspaper and milk revenues were developed from a test week of June 19, 1965, for each of the trains. Again protestants' criticism was principally based upon comparison with the prior case and upon the use of a test week in the computation. In the prior case the on-train newspaper revenue was $7,284, and the feeder revenue $65,744; whereas in this proceeding the on-train revenue was $5,449 in fiscal 1966 with no feeder revenue shown although there could have been some insignificant feeder revenue from Philadelphia papers. In the prior case the larger revenues were earned on carload shipments, on the newspaper rate, of a weekly newspaper published in Williamsport and transported by carrier to its St. Louis terminal. During the time covered by financial data in this proceeding those newspapers moved in mail service at mail rates, which did not necessarily move on subject trains. A conductor who works on trains 570 and 571 testified for protestants that newspapers now move on the trains but that they "don't have too many." The night trains handle most of the newspaper shipments.

In the prior case on-train milk revenues were $5,424 with feeder revenues of $117. In this proceeding the fiscal 1966 milk revenues were $1,160 with no feeder revenues shown. A witness for protestants testified that a Buffalo creamery receives approximately 2600 cans of cream annually at 40¢ per can (the empty cans are returned without charge), which would produce $1,040 of the total $1,160 milk revenue. All of the Buffalo milk shipments originated between Harrisburg and Buffalo. The remaining $120 milk revenue could not produce any significant feeder revenues.

The passenger, mail, and express feeder revenues were computed in substantially the same manner as the on-train

revenues, using 5 test weeks. The 50 percent formula for determining the cost of transportation on connecting trains was applied to those revenues to determine the net loss of feeder revenues. A printing concern at Hanover, Pa., ships printed material by storage mail over a freight branch line to York, 27 miles south of Harrisburg, and from York on trains 570 and 571 to Harrisburg for transfer beyond. The test weeks included some of those movements but none of Hanover-to-St. Louis or Hanover-to-Chicago cars, which move at indefinite intervals. The Hanover-to-Pittsburg traffic produced $1,730 in gross contributory revenues. Carrier's rail mileage Harrisburg to Pittsburgh is 244.7, to St. Louis is 856 (approximately three and one-half times the Pittsburgh mileage), and to Chicago 713 (approximately 3 times the Pittsburgh mileage). Assuming, in the absence of evidence, that the St. Louis and Chicago shipments are about equal to the Pittsburgh shipments, the St. Louis traffic would produce approximately $6,055 gross or $3,028 net contributory revenue; and the Chicago traffic would produce approximately $5,190 gross or $2,595 net contributory revenue, or a total of $5,623 in net contributory revenue. That revenue would apply only to the Baltimore-Harrisburg segment of the routes of trains 570 and 571.

A traffic analysis of revenue passenger traffic by carrier's sales department resulted in a determination that 18.3 percent of the passenger revenue of trains 570 and 571 would be retained on the remaining service and that the balance would be lost. Studies of traffic patterns and alternate modes of travel resulted in judgments that the following traffic would be retained: 10 percent of intra-district traffic (the districts are Buffalo to Renovo, Renovo to Harrisburg, and Harrisburg to Baltimore); 20 percent of the inter-district traffic between 2 or 3 of the districts; and 25 percent of the traffic transferring at Harrisburg to or from points to the east and west on the main line. Those findings

were reduced to the weighted average of 18.3 percent retention of passenger revenue.

The amount of mail and express traffic revenue that would be retained on remaining passenger trains was an estimate based upon the character of mail and express moving on trains 570 and 571, the flow of traffic, and knowledge of the kind of service which the Post Office and express company are trying to provide, gained from day-to-day contacts with their agents. Retained mail revenue includes $49,330 annually which the Post Office estimated would be handled in the baggage car after the RPO car was discontinued. Carrier estimates that up to the date of hearings the actual revenues fell approximately 30 percent below that estimate. Carrier does not expect to retain any of the newspaper or milk revenues on the night trains.

No on-train baggage revenue was reported, based upon the test period which developed none. Each passenger is entitled to check 150 pounds of baggage free, but is required to pay for excess weight. The total system baggage revenue for the Pennsylvania Railroad System in 1965 was $132,193. Considering the passenger traffic pattern and characteristics, carrier believes that any excess baggage charges on trains 570 and 571 would be insignificant.

Protestants earnestly contend that all feeder revenues should have been included as revenues in computing financial results of the operation of trains 570 and 571. The feeder revenue is revenue earned by connecting Pennsylvania Railroad passenger trains on traffic originated, transported, or terminated by the involved trains and is in no sense revenue earned by trains 570 and 571 which should be included in the revenue of trains 570 and 571. It is useful and important in determining whether system revenues will be improved by savings, or injured by losses, upon discontinuance of the involved trains; and, ultimately, in the determination of whether the operation of the trains is an undue burden on interstate commerce. See *Southern Pac.*

Co. Partial Discont. of Passenger Service, 320 I.C.C. 740, 749.

Train crew costs consist of wages (including fringe benefits) abstracted from time slips of the crews operating the trains. Crew cost savings are based upon the savings of train crewmen wages after recoupling train and engine crews upon discontinuance of trains 570 and 571, plus additives for increased wages and fringe benefit costs, and after eliminating the position of a swing brakeman run between Buffalo and Port Allegany which was abolished December 5, 1966.

Equipment costs are computed by multiplying the locomotive ton miles and the car miles operated by the appropriate system average costs. Savings are similarly computed on the saved locomotive ton miles and car miles. Equipment depreciation is computed on the rates approved by the Commission. Joint facility expense is applicable only at the Buffalo terminal. That expense, as included in the above computations, is the difference between the total cost for units now using those facilities and the total cost for units which will use the facilities after discontinuance of the trains, conforming to approved procedures. Saved station expense includes only the wages and fringe benefit costs of 10 station employees whose positions would be abolished upon discontinuance. Injuries to persons is the annual average for the five fiscal years 1962 through 1966 of claims involving trains 570 and 571 between Harrisburg and Buffalo. No computations were made, or savings claimed, between Harrisburg and Baltimore.

Maintenance of way and structures savings are based on the elimination, upon discontinuance, of delays and time lost by track crews in clearing single track for train 570 between Buffalo and Muncy, Pa., and for train 571 between Rockville, Pa., and Renovo, all north of Harrisburg. Studies were made, involving only gangs using heavy equipment, which developed the actual number of days worked and the

average lost time per train and per day. The lost time occasioned by these trains was applied to the number of men and the number of days worked to compute the wage value of the time lost. No cost other than wages was computed or claimed. The study also included a comparison of units of work completed without interruption and the units completed when interruption was caused by the trains. There was some interruption on double tracks, amounting to 5 to 10 minutes per train, but it was not computed or claimed because precise computation was difficult. The studies demonstrate that the claimed savings will accrue upon discontinuance.

The methods employed in computing revenues, feeder revenues, costs, and savable costs fairly follow methods approved by the Commission; and the results, after the indicated adjustments, fairly state revenues and costs.

Protestants sponsored, through a consultant, a study of results of operation between Buffalo and Harrisburg. In the main the consultant rejected the current revenue and cost studies made by carrier but made no studies of his own, and is not personally familiar with the operation or equipment of the trains. He presented no cost studies relating to the results of operations between Baltimore and Harrisburg.

The consultant computed passenger revenues as follows: He analyzed the passenger counts for 1961 in the prior case and for fiscal 1966, and concluded that the number of revenue passengers had declined by 5.5 percent in the intervening 5 years; he then reduced the 1961 on-train revenues by 5.5 percent to calculate fiscal 1966 on-train revenues; and to that figure he added 10 percent for fare increases in the 5-year period. The actual revenue passenger count taken from the conductors' daily reports for 1961 and 1965 (the total 1966 figures are not in the record), discloses that the trains transported 54,550 revenue passengers between Harrisburg and Buffalo in 1961, and 34,781 in 1965, or a decline

of 36.2 percent in 4 years instead of consultant's 5.5 percent in 5 years. In view of the probability that traffic patterns have changed, it is questionable procedure to attempt to compute revenues as a percentage of some prior year's revenues. Consultant also concluded that feeder revenues should be 50 percent of on-train revenues and applied that percentage to the calculation of on-train revenues. Both computations are based upon assumptions and neither is factual.

Other revenues are, in large part, prepared from somewhat similar computations and comparisons with 1961 results from the prior case. In addition, the consultant improperly included in the feeder revenues of trains 570 and 571 all revenues forecast as earned by connecting railroads which participated with Pennsylvania Railroad in the total transportation of traffic. Since those revenues are not carrier's system revenues, they may not be included.

The consultant would substantially reduce costs of operation claimed by carrier. Most of his reductions are based upon cost accounting theories and formulas. As already discussed, the Commission required that cost computations must develop out-of-pocket costs, and has uniformly approved system average costs per unit as a reasonable method of computing savable costs. The consultant objects to the use of locomotive and car depreciation based upon his belief that no equipment would be retired. The record establishes that 2 diesel units, 2 coaches, and 6 head-end cars would be retired upon complete discontinuance of the trains, and computations were adjusted for one turn-around train between Baltimore and Harrisburg in the event of discontinuance between Harrisburg and Buffalo. No purpose would be served by detailed discussion of the procedures employed by the consultant since they do not conform to the approved methods of computing out-of-pocket costs, and no persuasive reason appears for adopting the proposed procedures.

The adjusted financial results of operating the trains for fiscal 1966, pro forma fiscal 1966, and pro forma fiscal 1967 establish the following results: The 312 mile operation of the trains between Harrisburg and Buffalo produced savable losses of $355,779, $325,477, and $324,046, respectively; and the 83-mile operation between Baltimore and Harrisburg produced a savable loss of $26,518, a loss of revenue to the system of $66,296, and a loss of revenue to the system of $69,245, respectively. We find that the operation of trains 570 and 571 between Buffalo and Harrisburg is an undue burden on interstate commerce; and that the operation of trains 570 and 571 between Baltimore and Harrisburg is not a burden on interstate commerce.

Passenger utilization—In the discussion of protestants' proposed method of computing passenger revenues, it was noted that the total number of revenue passengers on trains 570 and 571 in 1965, between Buffalo and Harrisburg, had declined 36.2 percent from 1961. The decline for the same period was 37.7 percent between Harrisburg and Renovo, and 34.2 percent between Renovo and Buffalo. The decline continued during the first 6 months of 1966. The "from and to" counts of passengers in this proceeding are made from 9 test weeks February 1965 and November 1966, using conductors' daily revenue passenger counts. Protestants introduced into evidence summaries of similar counts made for 1959, 1960, and 1961, which were used in the prior case, and which show the daily average number of revenue passengers. Those studies were confined to the Harrisburg-to-Buffalo operation. The studies in this proceeding include the Baltimore-to-Harrisburg as well as the Harrisburg-to-Buffalo operations. Combining the daily and weekend trains to conform to the current operation of trains 570 and 571, the daily averages of revenue passengers per trip are:

	1959	1960	1961	1965-1966
Train 570	62.6	57.1	53.7	44.3
Train 571	57.1	57.1	54.0	39.2

Those averages confirm the downward trend in use of the trains by revenue passengers, particularly considering the fact that the more heavily used Baltimore-to-Harrisburg section is included in the 1965-1966 averages.

Alternate transportation—Competition from private automobiles over substantially improved highways, including interstate and limited access highways, continues to decrease intercity railroad passenger patronage. Bus transportation over the improved highways at lower-than-rail fares continues its strong competition. Commercial airline travel because of its speed and convenience continues to attract a larger share of long-distance passengers. Those factors of competition have affected traffic on trains 570 and 571 as demonstrated by testimony at the hearings, including testimony of some of the public witnesses.

Pennsylvania Railroad's alternate night train service between Baltimore and Buffalo and afternoon and evening train service between Baltimore and Harrisburg have been described, and the schedules are shown in Appendix A. The night trains depart from terminals in the early evening and arrive at terminals at 8:10 a.m., and 8:30 a.m., on schedules which are generally preferred for business, shopping, and other such trips were the traveller wants to spend the day in his activities and start home that same night. The night trains have sleeping cars for the full trip and dining service on the southern trip between Harrisburg and Washington. The night train schedules between Renovo and Harrisburg would admittedly be inconvenient for passengers who prefer daytime travel. Seven stations, which have only an occasional passenger boarding trains 570 and 571, would not be served by the night trains. Those stations and their populations are: Franklinville, N. Y., 2,124; Eldred, Pa., 1,107; Jersey Shore, Pa., 5,613; Muncy, Pa., 2,830; Glen Rock, Pa., 1,546; New Freedom, Pa., 1,395; and Arcade, N. Y., 1,930. None of those stations is more than 21 miles from a night-train station. Carrier would stop the night

train at the stations if there were any substantial demand for service.

Most stations served by trains 570 and 571 have adequate bus service, and the principal points have frequent through bus service to intermediate points and to termini of the trains and of connecting trains. Only two communities north of Harrisburg have no regular bus service, and only two communities south of Harrisburg do not have through bus service. The two north of Harrisburg have a total population of 6,713 and will have rail service on the night trains. The two south of Harrisburg have a total population of 2,941. They are not served by the night trains but together contribute about one passenger every three days on trains 570 and 571, and they are only 15 and 20 miles from the nearest rail service. The principal cities have available air service.

Evidence in opposition—State and local officials; representatives of civic, religious, and charitable organizations; businessmen; professional men; and members of the public appeared at the hearing to make statements or give evidence in opposition. Public officials and civil leaders opposed the discontinuance on the ground that continued economic development and expansion of industry in the area served by the trains is dependent upon retention and expansion of all available public transportation, including railroad passenger service; and that discontinuance would adversely affect the economy, the colleges, and the developing resort and recreational business in the area.

Business and professional men testified to the need for both passenger and head-end service. They expressed concern that alternate service on head-end traffic would be less dependable, less satisfactory, and more expensive. Business trips by train are convenient and comfortable, and the service is dependable while other means of transportation are subject to interruption, especially under adverse weather conditions.

Students and teachers use the trains to and from school and in the holiday travel. Disabled and elderly persons find trains more convenient and comfortable in travel for medical attention and other reasons. Members of religious orders travel on the trains in the performance of their duties. Some passengers are afraid to travel by air, or find air travel expensive, and prefer rail to bus travel.

Protection of employees adversely affected—It is well established that this Commission has no authority to impose employee protective conditions in a Section 13a discontinuance case, although the probable adverse effect of discontinuance upon employees is a factor to be considered in evaluating the public convenience and necessity. In our opinion, the probable adverse effect upon the carrier's employees, when considered with other factors discussed herein, does not justify the findings which we would be required to make before we may order the continuance of the involved trains.

Discussion and Conclusions

In a proceeding under Section 13a, the factors to be considered, among others, include the effect of the discontinuance upon the localities served, the use presently made of the service sought to be discontinued by the public, the availability of alternative transportation service to the public in the area, and costs incurred and the financial losses sustained by the carrier in providing the service. The burden upon the carrier and upon interstate commerce must be weighed against the need for the service. A substantial need for the service under certain circumstances might justify the continuation of the service, even though it be performed at a loss to the carrier. For example, discontinuance of a particular service might inflict upon the affected communities serious injury while continuation of the service would impose a relatively light financial burden upon the carrier.

As previously found, loss from operation of trains 570 and 571 in fiscal 1966, adjusted to exclude the RPO car, are $355,779 between Harrisburg and Buffalo and $26,518 between Baltimore and Harrisburg. RPO revenues excluded were $217,158. The mileage between Baltimore and Harrisburg is 83 miles or approximately 21 percent of the total 395 mile run. Applying that percentage against total revenues, the latter run earned $45,603 and the Harrisburg-Buffalo run earned $171,555 of the fiscal 1966 RPO revenues. Adjustment of the above losses to show RPO revenues establishes that actual fiscal 1966 operations resulted in a loss of $184,224 between Harrisburg and Buffalo and a net profit of $19,085 between Baltimore and Harrisburg. The financial data further show that, on a pro forma basis, there would be a system loss of $69,245 in fiscal 1967 upon discontinuance of the trains between Baltimore and Harrisburg, principally from loss to the system of feeder revenue attributable to that route, the bulk of which traffic moves on the main line west of Harrisburg. The financial data for fiscal 1966 further show that slightly less than 30 percent of the revenues of the trains is earned over the 21 percent of operating distance between Baltimore and Harrisburg. Based upon those results, and upon factors previously discussed, we find that the operations of trains 570 and 571 between Baltimore and Harrisburg is supported by the traveling and shipping public, although marginally, and is required by the public convenience and necessity.

In contrast, in fiscal 1966 the operations between Harrisburg and Buffalo resulted in an out-of-pocket loss of $184,224, an out-of-pocket loss of $355,779 when adjusted for loss of the RPO car; and a pro forma loss for fiscal 1967 (based upon 1966 operations) of $324,046. Based upon the continuing decline in patronage, future annual losses will equal or exceed the indicated 1967 loss, which would constitute a substantial burden even though suffered by a railroad as financially sound as carrier, and would unduly burden interstate commerce.

Findings have been made at appropriate points in the discussion of specific topics. In balancing these considerations against the relatively small public need for the service and the availability of alternate transportation services, it is clear that discontinuance of the trains between Harrisburg and Buffalo is consistent with the purpose of Section 13a(1) and the objectives of the National Transportation Policy.

Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be without material significance or not justified.

We find that the operation by The Pennsylvania Railroad Company of its passenger trains Nos. 570 and 571 between Harrisburg, Pa., and Buffalo, N.Y., is not required by public convenience and necessity and that continued operation thereof will unduly burden interstate commerce.

We further find that the continued operation by said railroad of its passenger trains Nos. 570 and 571 between Baltimore, Md., and Harrisburg, Pa., is required by public convenience and necessity and will not unduly burden interstate commerce.

An appropriate order will be entered requiring the carrier to continue the operation of the trains specified between the last-named points for a period of 1 year from the date hereof, and discontinuing the investigation herein.

COMMISSIONER BROWN, dissenting:

The majority has determined (a) that the operation by the Pennsylvania Railroad Company of its passenger trains Nos. 570 and 571 between Harrisburg, Pa., and Buffalo, N.Y., is not required by public convenience and necessity and the continued operation thereof will unduly burden interstate commerce; and (b) that the continued operation by the Pennsylvania Railroad Company of its passenger trains Nos. 570 and 571 between Baltimore, Md., and Harrisburg, Pa., is required by the public convenience

and necessity and will not unduly burden interstate commerce. In my judgment both portions of the involved operations are required by the public convenience and necessity and the continued operation of these trains will not unduly burden interstate or foreign commerce.

As noted earlier, this is not a matter coming before the Commission for the first time. In F. D. No. 21986, *Pennsylvania Railroad Company Discontinuance of Passenger Train Service between Buffalo, N. Y., and Harrisburg, Pa.*, (not printed), decided July 27, 1962 (prior case), the Commission, Division 3, considered discontinuance of the operation between Buffalo and Harrisburg and concluded that the public convenience and necessity required the continued operation. The facts developed five years ago have not materially changed and yet the Commission here reaches a different result.

In the prior case, the Commission, Division 3, found that the night trains operated by the carrier would not be a convenient substitute for the day trains. These night trains have not changed their operations since that time. The availability of other alternate train service has seriously diminished since the Erie-Lackawanna's Phoebe Snow has been discontinued. The available transportation service by air has materially decreased in the past five years. For example, the city of Williamsport, Pa., is now served only by Allegheny Airlines; Olean, N. Y., is served by only one plane and even that service is in doubt. The bus service available does not show any material change. But more important, seven communities are without bus service and most of the available service requires a transfer.

In 1962, 26 witnesses testified in opposition to the proposed discontinuance. Here, some 43 witnesses oppose the proposed discontinuance. Many of the witnesses are representatives of the community, elected officials, civil leaders, and businessmen. They indicate, as in the prior case, that discontinuance of the service would be a handicap to their

communities and to patrons of the service. Although passenger patronage may have decreased, the involved trains are certainly being well utilized. In fact, in 1965-1966, the average number of revenue passengers per trip for train 570 was 44.3; for train 571, 39.2. I consider this significant when the normal consist of the train is one 60 passenger car plus one additional coach on Sundays from Williamsport to Harrisburg. This extra coach was ordered by the Pennsylvania Public Utilities Commission to prevent *overcrowding*. It has also been pointed out that in some instances the passengers were required to stand because the seats were taken.

No reason has been shown how the public interest considerations have changed in the past five years which would warrant a complete reversal of the prior findings. In many respects this record supports a stronger finding that the public convenience and necessity requires the continuation of the involved service than did the earlier record.

This decision has apparently been determined solely upon consideration of the losses purportedly sustained in the operation between Buffalo and Harrisburg. These losses are questionable. The adroit manipulation of figures by cost experts can make almost any operation appear sound or unsound as may be required to suit their purposes and I do not intend to be ruled by the tyranny of figures when evaluating the public interest.

When partial discontinuance was sought in the prior case, the Commission concluded that a substantial amount of patronage would be lost to the operation south of Harrisburg if the operation north of Harrisburg were discontinued, and that it would be doubtful that the Baltimore-Harrisburg run alone would be profitable. Here, the Baltimore-Harrisburg operation has been found to be a borderline operation, from an out-of-pocket viewpoint, and any further loss of revenue would endanger that operation if the Commission were to rely entirely upon out-of-pocket

cost. Therefore, in my judgment, a finding cannot rationally be made that the public convenience and necessity requires one operation while at the same time a related decision is made which will significantly endanger the success of that operation as well as others. These trains are not just isolated operations between Buffalo and Harrisburg. They cross applicant's main line at Harrisburg, which has an important effect on many east-west trains as well as the Baltimore to Harrisburg operations. It should not be discontinued.

I would find that the continued operation of the trains 570 and 571, in their entirety, between Baltimore and Buffalo is required by the public convenience and necessity. The present and future benefit to the people and the area involved from such continued operation outweighs any possible savings which would be gained by applicant. I would also find that the continued operation would not constitute an undue burden on interstate commerce. Applicant's overall financial picture is sound and has been steadily improving. Cf. *Denver & R. G. W. R. Co. Discontinuance of Passenger Ser.*, 317 I.C.C. 722.

APPENDIX A

Schedules effective October 30, 1966, Trains Nos. 549, 571, 575, 548, 554, 570, 574, between Washington, Harrisburg and Buffalo and Connections.

WASHINGTON, NEW YORK, PHILADELPHIA AND WILLIAMSPORT, BUFFALO

Read Down: Northern Express 575 Daily Except Dec. 25 & Jan. 1	Read Down: Buffalo Day Express 571 Daily	EASTERN STANDARD TIME	Read Up: Baltimore Day Express 570 Daily	Read Up: Southern Express 574 Daily Except Dec. 25 & Jan. 1
PM	AM		PM	AM
7.00	*7.00	Lv.....Washington, D. C.....Ar	*9.35	9.15
7.55	8.15	" Baltimore, Md. (Penna. Sta.) "	8.45	8.10
9.33	9.56	"..... York, Pa..... "	6.55	6.30
10.25	10.45	Ar.....Harrisburg, Pa.....Lv	6.00	5.40
3	25	Connecting Train No.	16	4
v6.50	7.30	Lv.New York, N. Y. (Penna. Sta.)Ar	#9.25	8.15
c8.17	9.01	"...North Philadelphia, Pa.... "	#7.53	d6.25
8.51	9.35	"..... Paoli, Pa..... "	#7.22	d5.56
9.43	10.27	"..... Lancaster, Pa..... "	#6.36	.....
10.20	11.10	Ar.....Harrisburg, Pa.....Lv	#5.55	4.29
11.35	11.25	Lv.....Harrisburg, Pa.....Ar	5.43	4.20
f12.10	.....	"..... Millersburg, Pa..... "	5.08	.....
12.41	12.32	"..... Sunbury, Pa..... "	4.28	3.05
f1.00	.....	"..... Montandon, Pa..... "	.....	f2.50
f1.07	12.57	"..Milton, Pa., (q Lewisburg). "	4.14	.....
f1.13	.....	"..... Watsontown, Pa..... "	.....	f2.41
f1.21	.....	"..... Montgomery, Pa..... "	.....	.....
.....	1.17	"..... Muncy, Pa..... "	3.52	.....
2.15	2.02	Ar.....Williamsport, Pa.....Lv	3.08	1.35
2.15	2.02	Lv.....Williamsport, Pa.....Ar	3.08	1.35
.....	.....	"..... Jersey Shore, Pa..... "	2.43	.....
3.12	2.48	"..... Lock Haven, Pa..... "	2.24	12.58
3.52	3.27	"..... Renovo, Pa..... "	1.35	12.14
5.10	4.46	"..... Emporium, Pa..... "	12.31	11.06
5.52	5.27	"..... Port Allegany, Pa..... "	11.52	10.40
.....	f5.46	"..... Eldred, Pa..... "	f11.34	.....
6.30	6.06	"..... Olean, N. Y..... "	11.06	9.44
.....	6.40	"..... Franklinville, N. Y..... "	10.40	.....
.....	f6.57	"..... Arcade, N. Y..... "	.....	.....
7.45	7.21	"..... East Aurora, N. Y..... "	9.51	8.18
8.30	8.05	Ar.Buffalo, N.Y. (Central Term.)Lv	9.15	7.45
AM	PM		AM	PM

Washington-Harrisburg

Read Down: Buffalo Day Express 571 Daily	Read Down: The General 549 Daily	Read Down: Northern Express 575 Daily Except Dec. 25 & Jan. 1	EASTERN STANDARD TIME	Read Up: The General Southern Express 548 Daily	Read Up: 554 Daily Except Dec. 25 & Jan. 1	Read Up: Baltimore Day Express 570 Daily
170	154				174	175
AM	PM	PM	Connecting Train No.	AM	PM	PM
NLB	NLB				NLB	NLB
u7.00	u5.00	7.00	Lv..Washington, D.C...Ar	9.15	6.50	9.35
7.45	5.45	7.40	Ar...Baltimore, Md...Lv	8.10	u6.09	*8.53
8.15	6.00	7.55	Lv...Baltimore, Md...Ar	8.10	5.05	8.45
9.10	.....	.....	"..New Freedom, Pa..Lv	.....	.....	f7.30
9.21	.....	.....	"...Glen Rock, Pa... "	.....	.....	f7.22
9.56	7.35	9.33	"..... York, Pa..... "	6.30	3.26	6.55
10.45	8.20	10.25	Ar..Harrisburg, Pa...Lv	5.40	2.40	6.00
AM	PM	PM		AM	PM	PM

REFERENCE NOTES

* Connecting train. Passengers change trains at Baltimore.

\# Daily except Saturdays. On Saturdays 1 hour later at all points.

c Stops only to receive passengers

d Stops only to discharge passengers.

e On Saturdays and Dec. 25 and Jan. 1 connection leaves Washington 4.30 PM

f Stops only on signal or notice to agent or conductor to receive or discharge passengers.

q Beachel Cab Co. operates taxi service between Lewisburg and Milton--Phone 742-9651. Fare one way $1.60 for one passenger and 50¢ for each additional passenger.

u No checked baggage Washington to Baltimore.

v Stops only to receive passengers for points west of Philadelphia.

NLB No local checked baggage handled on this train.

APPENDIX B

POPULATION
Actual 1940-1950-1960
Estimated 12-31-65

		Local Population				Metropolitan Area Population			
		12-31-65	1960	1950	1940	12-31-65	1960	1950	1940
Baltimore, Md.	(1)	923,500	939,024	949,708	859,100	1,873,100	1,727,023	1,405,399	1,046,69
New Freedom, Pa.	(2)	-	1,395	1,271	1,137	-	-	-	-
Glen Rock	(2)	-	1,546	1,477	1,412	-	-	-	-
York	(2)	52,400	54,504	59,953	56,712	314,000	238,336	202,737	92,62
Harrisburg	(3)	78,500	79,697	89,544	83,893	402,400	345,071	292,241	173,36
Millersburg	(4)	-	2,984	2,861	2,959	-	-	-	-
Sunbury	(5)	12,800	13,687	15,570	15,462	-	-	-	-
Milton	(5)	-	7,972	8,578	8,313	-	-	-	-
Muncy	(6)	-	2,830	2,756	2,606	-	-	-	-
Williamsport	(6)	40,400	41,967	45,047	44,355	115,100	109,000	-	-
Jersey Shore	(6)	-	5,613	5,595	5,432	-	-	-	-
Lock Haven	(7)	11,300	11,748	11,381	10,810	-	-	-	-
Renova	(7)	-	3,316	3,751	3,784	-	-	-	-
Emporium	(8)	-	3,397	3,646	3,775	-	-	-	-
Port Allegany	(9)	-	2,742	2,519	2,356	-	-	-	-
Eldred	(9)	-	1,107	1,199	1,051	-	-	-	-
Olean, N. Y.	(10)	21,300	21,868	22,884	21,506	-	-	-	-
Franklinville	(10)	-	2,124	2,092	1,884	-	-	-	-
Arcade	(11)	-	1,930	1,818	1,683	-	-	-	-
East Aurora	(12)	-	6,791	5,962	5,253	-	-	-	-
Buffalo	(12)	505,000	532,759	580,132	575,901	1,414,200	1,306,957	1,089,230	857,719

Note: Blank spaces - no figures available

Source: 1940-1950-1960-Bureau of Census, U. S. Dept. of Commerce (Rand McNally Atlas)
12-31-65 - Sales Management - 1966 Survey of Buying Power (June 10, 1966 issue)

Counties: (1) Independent City
(2) York
(3) Dauphin
(4) Berks
(5) Northumberland
(6) Lycoming
(7) Clinton
(8) Cameron
(9) McKean
(10) Cattaraugus
(11) Wyoming
(12) Erie

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3rd day of May A. D. 1967.

Finance Docket No. 24398

PENNSYLVANIA RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 570 AND 571 BETWEEN BUFFALO, N. Y., AND BALTIMORE, MD.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said Division, dated January 3, 1967, a hearing having been held and the said Division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, required to continue the operation of its passenger trains Nos. 570 and 571 between Baltimore, Md., and Harrisburg, Pa., for a period of one year from the date hereof.

It is further ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, Division 3.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX D

Order

Service Date
July 14, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 6th day of July, 1967.

Finance Docket No. 24398

PENNSYLVANIA RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 570 AND 571 BETWEEN BUFFALO, N. Y., AND BALTIMORE, MD.

Upon consideration of the record in the above-entitled proceeding, including the petitions filed May 25, 1967, of the Pennsylvania Public Utility Commission, various railroad brotherhoods, municipalities, boroughs, community organizations, and individuals, listed in the appendix, and of the Public Service Commission of the State of New York, filed June 12, 1967, for reconsideration of the report and order of the Commission, Division 3, dated May 3, 1967, which found, *inter alia*, that operation by The Pennsylvania Railroad Company of its passenger trains Nos. 570 and 571 between Harrisburg, Pa., and Buffalo, N. Y., is not required by public convenience and necessity and the continued operation thereof will unduly burden interstate commerce; and the reply to the petitions by The Pennsylvania Railroad, filed June 22, 1967; and

It appearing, That total operating expenses in the amount of $909,912 incurred in the operation of trains Nos. 570 and 571 between Buffalo and Harrisburg for the fiscal year ended June 1966, exceeded aggregate revenues of $676,157, including 50 percent of total feeder revenues of $244,049, thus resulting in operating loss of $233,755; that other material matters set forth in the petitions for reconsideration

have been considered by Division 3, and discussed in its report; that the decision is based upon adequate findings supported by the record; that there has been presented no error of fact or law with respect to the matters complained of by the petitioners herein; and that no showing has been made warranting reconsideration:

And it further appearing, That section 13a(1) of the act authorizes a carrier to file a notice of a proposed discontinuance or change of service of a train, *in whole or in part,* and permits the Commission, after a hearing and investigation, to require the continuance of such train service, *in whole or in part,* for one year or less, and that these two provisions are not so interrelated that the Commission is precluded from requiring the continuance of only a portion of a train service where the carrier gave notice of its intention to discontinue the entire service;

It is ordered, That the petitions be, and they are hereby denied.

And it is further ordered, That the order of May 3, 1967, shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

H. Neil Garson,
Secretary.

(Seal)

Appendix

Petition for reconsideration was filed jointly by protestants Cooperative Legislative Committee — Railroad Brotherhoods in Pennsylvania, Brotherhood of Railway Trainmen—State of New York, Brotherhood of Railroad Trainmen—State of Pennsylvania, and Brotherhood of Railway Clerks; a joint petition was also filed on behalf of protestants, City of Williamsport, City of Buffalo, City of Lock Haven, Borough of Renova, Clinton County Commissioners, Milton, Pa., Chamber of Commerce, Milton

Area Industrial Development Association, Renovo Community Trade Association, Renovo Rotary Club, P.R.R. Retired Men's Association No. 8 Renovo, Pa., W. Max Bossert, George Hamilton Forman, and Milton J. Shapp, and of the Oakleigh Manor Civic Association in Baltimore, Md. (the last-mentioned filed June 12, 1967).

APPENDIX E

Service Date
January 4, 1967

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3rd day of January A.D., 1967.

Finance Docket No. 24398

PENNSYLVANIA RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 570 AND 571 BETWEEN BUFFALO, N. Y. AND BALTIMORE, MD.

It appearing, That on December 7, 1966, the Pennsylvania Railroad Company filed with this Commission notices under section 13a(1) of the Interstate Commerce Act, as amended, that effective January 15, 1967, said carrier will discontinue service of its passenger trains Nos. 570 and 571 between Buffalo, N. Y., and Baltimore, Md.

It further appearing, That complaints by certain individuals, associations, communities, and by railway employees have been received requesting suspension of the proposed discontinuance pending investigation to determine the extent of public need for the trains in question;

It further appearing, That discontinuance of the said train service by the Pennsylvania Railroad Company may not be warranted by the public convenience and necessity, and that operation of such service may not unduly burden interstate commerce;

It further appearing, That the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein, for the reason that under the provisions of section 13a(1) of the Interstate Commerce Act, the said train service may be discontinued unless a decision herein is made before expiration of the four-month period hereinafter provided for;

It is ordered, That an investigation of the proposed discontinuance of train service described hereinabove, be, and it is hereby, instituted under the provisions of section 13a(1) of the Interstate Commerce Act, and that the matter be assigned for hearing at a time and place hereafter to be fixed;

It is further ordered, That the train service described hereinabove be continued pending hearing and decision in said investigation, but not for a longer period than four months beyond the date when the discontinuance otherwise would have become effective unless otherwise ordered herein; and

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision-making process in this proceeding, and the record herein shall be considered as certified to the Commission, Division 3, for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission, Division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX F

Order

Service Date
March 7, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its offices in Washington, D. C., on the 3rd day of March, A. D. 1967.

Finance Docket No. 24398

PENNSYLVANIA RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 570 AND 571 BETWEEN BUFFALO, N. Y. AND BALTIMORE, MD.

It appearing, That on February 27, 1967, certain protestants filed an Appeal to Division 3 from the ruling of the hearing examiner overruling motions by protestants to strike the testimony of a witness for The Pennsylvania Railroad Company concerning exhibits identified as Nos. H-46, H-47, and H-48;

It further appearing, That the evidence sought to be stricken was in support of three proposed exhibits which have not yet been offered in evidence, and that the evidence and the proposed exhibits purport to show financial results of the operation of Trains Nos. 570 and 571 over the segment of railroad between Buffalo and Harrisburg, Pa., and exclude the results of operation on the remaining segment of railroad over which the trains operate between Harrisburg and Baltimore, Md.;

It further appearing, That the claimed financial results of operations over the entire route of the subject trains between Buffalo and Baltimore have been shown in evidence and in exhibits on previous days of hearing.

And it further appearing, That evidence of the financial results of operations of the trains between Buffalo and Harrisburg are germane to the investigation by the Commission of the proposed discontinuance of Trains Nos. 570 and 571 and may well be helpful to the Commission

in making its ultimate findings and conclusions, and its determination of the investigation:

It is ordered, That the ruling of the hearing examiner in open hearing which denied the protestants' motion to strike The Pennsylvania Railroad Company's evidence concerning the financial results of operation of the trains between Buffalo, N. Y., and Harrisburg, Pa., be, and it is hereby, sustained.

By the Commission, Division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX G

Summary of Decisions of Interstate Commerce Commission Under Section 13a(1) for the Period Jan. 1, 1967 Through April 30, 1968

	Trains	Granted	Denied
A. COMPLETE DISCONTINUANCE SOUGHT	70		
Complete Granted		47	
Partial Granted		9	
Application Denied			14
Totals	70	56	14
Percentage	100%	80%	20%
B. PARTIAL DISCONTINUANCE SOUGHT	64		
Partial Granted		60	
Application Denied			4
Totals	64	60	4
Percentage	100%	94%	6%
C. GRAND TOTAL	134	116	18
Percentage	100%	87%	13%

This Appendix Prepared By:

JOHN G. CLAPP
Dodge House (Rm. 331)
Washington, D. C.

Decisions of the Interstate Commerce Commission Under Section 13a(1)
for the Period January 1, 1967 Through April 30, 1968
(Summary on p. 43a)

Sheet No. One of Four Sheets

Date of ICC Decision	Docket Number	Railroad	Trains	Actual No. of Trains Involved	Train Name	Terminii	Partial Discontinuance Applied For	Partial Discontinuance Granted	Complete Discontinuance Granted
1/17/67†	FD 24424	SOU	35-36	2		Chattanooga-Memphis			X
1/25/67 (R)	FD 24000	B&M	20-21, 75-76	4	Ambassador Montrealer Washingtonian	Springfield, Mass.-White River Jct., Vt.	X	X	
2/13/67	FD 24277	WP	17-18	2	California Zephyr	San Francisco-Salt Lake City	X		
2/15/67	FD 24337	CRI&P	39-40	2		Kansas City-Tucumcari, N. M.	X	X	
3/ 1/67	FD 24348	IC	8	1	Creole	Memphis-Carbondale, Ill.	X	X	
3/ 1/67	FD 24348	IC	15-16	2	Chickasaw	Carbondale, Ill.-Memphis	X	X	
3/ 1/67	FD 24348	IC	4	1	Louisiane	New Orleans-Memphis	X	X	
3/ 1/67	FD 24348	IC	25	1	(Southern Express)	Carbondale, Ill.-New Orleans	X	X	
3/20/67	FD 23470	CRI&P CB&Q	19-190-8 15-201-20	2	(Zephyr Rocket)	Minneapolis-St. Louis			X
4/24/67	FD 24383	FRISCO	1-2	2	Oklahoman	St. Louis-Oklahoma City			X
5/ 3/67	FD 24398	PRR	570-571	2	Day Express	Baltimore-Buffalo		X	
5/11/67 (R)	FD 24061	MoP-IC	53-38 52-35	2	(The Houstonian)	Houston-New Orleans			X
5/15/67	FD 24404	D&RGW	7-8	2	Prospector	Denver-Salt Lake City			X
6/ 5/67	FD 24435	C&O	43-46 3-4 47-46	6	F.F.V.—Sportsman	Washington, D. C.-Cincinnati Portsmouth, Va.-Charlottesville, Va. Ashland, Ky.-Detroit			
6/19/67†	FD 24615	CB&Q	7	1		Chicago-Omaha	X	X	
6/20/67	FD 24462	CB&Q	33-7 8-34	2		Alliance, Nebr.-Brush, Colo.	X	X	
7/26/27	FD 24499	IC	13-14	2	Land O'Corn	Chicago-Waterloo, Iowa			X

Sheet No. Two of Four Sheets

Date of ICC Decision	Docket Number	Railroad	Trains	Actual No. of Trains Involved	Train Name	Terminii	Partial Discontinuance Applied For	Partial Discontinuance Granted	Complete Discontinuance Granted
8/11/67	FD 24529	SP	39-40	2		Tucumcari, N. M.-Los Angeles	X(L)	X(L)	
8/24/67	FD 24545	CB&Q	42-43	2		Billings, Mont.-Alliance, Nebr.	X		
8/24/67	FD 24546	C&S-CB&Q	29-30	2		Denver-Billings, Mont.			X
8/30/67	FD 24542	MONON	5-6	2	Thoroughbred	Chicago-Louisville			X
8/31/67	FD 24562	C&S-FW&D	2-7	2	Texas Zephyr	Dallas-Denver			X
9/ 5/67	FD 24558	N&W	110-111	2	Banner Blue	St. Louis-Chicago			X
9/ 5/67	FD 24558	N&W	301-304	2	Wabash Cannonball	St. Louis-Detroit			
9/19/67	FD 24571	SOU	35-34	2	Piedmont Ltd.	Washington, D. C.-Salisbury, N. C.	X(L)	X(L)	
9/19/67†	FD 24728	CB&Q	8	1		Omaha-Chicago	X	X	
9/21/67	FD 24589	MILW	19-20	2	The Arrow	Chicago-Omaha			X
9/27/67	FD 24595	NP	3-4	2	(The Alaskan)	St. Paul, Minn.-Jamestown, N. D.	X(L)	X(L)	
10/ 6/67	FD 24616	CRI&P	15-16	2	(Kansas City Rocket)	Minneapolis-Kansas City			X
10/19/67††	FD 24772	ATSF	3-4	2		Kansas City-Gallup, N. M.			X
10/19/67††	FD 24474	ATSF	7-8	2		Chicago-Bakersfield, Calif.			X
10/26/67†	FD 24771	CRI&P	21-22	2		Memphis-Tucumcari, N. M.			X
11/ 1/67†	FD 24779	SP	21-22	2		Ogden, Utah-Oakland, Calif.			X
11/ 7/67	FD 24625	MoP	31-32	2		Little Rock, Ark.-Alexandria, La.	X(L)	X(L)	
11/21/67†	FD 24812	SOU	47	1	Southerner	Washington, D. C.-Atlanta	X	X	

Sheet No. Three of Four Sheets

Date of ICC Decision	Docket Number	Railroad	Trains	Actual No. of Trains Involved	Train Name	Terminii	Partial Discontinuance Applied For	Partial Discontinuance Granted	Complete Discontinuance Granted
11/21/67†	FD 24812	SOU	36	1	Peach Queen	Atlanta-Washington, D. C.			X
11/22/67	FD 24646	L&N	53-92	2	Hummingbird-Georgian	St. Louis-Nashville		X	
11/24/67†	FD 24809	FRISCO	101-102	2	Southland	Kansas City-Birmingham			X
11/28/67	FD 24645	IC	3	1	Louisiane	Memphis-New Orleans	X	X	
11/28/67	FD 24645	IC	8	1	Creole	New Orleans-Memphis	X(L)	X(L)	
12/ 5/67	FD 24827	CB&Q	7-8	2		Omaha-Denver	X(L)	X(L)	
12/19/67†	FD 24836	SCL	77-78	2	Palmetto	Richmond, Va.-Florence, S. C.	X	X	
1/25/68	FD 24725	C&EI	93-54	2	Georgian-Hummingbird	Chicago-Evansville, Ind.	X	X	
1/26/68	FD 24723	PRR	453-456	2		Chicago-Valparaiso, Ind.			
2/ 7/68†	FD 24923	SCL	17-18	2	Tidewater	Portsmouth, Va.-Raleigh, N. C.	X	X	
2/ 9/68	FD 24739	GN	11-14	2	Red River	St. Paul, Minn.-Fargo, N. D.	X(L)	X(L)	
2/15/68	FD 24746	CRI&P-SP	3-4	2	Golden State	Chicago-El Paso, Tex.	X	X	
2/15/68†	FD 24931	L&N	14-19	2	Hummingbird	Memphis-Bowling Green, Ky.	X	X	
2/21/68†	FD 24942	L&N	17-18	2	(Flamingo)	Cincinnati-Atlanta	X(L)	X(L)	
2/26/68	FD 24759	CB&Q	22	1	Morning Zephyr	Minneapolis-Chicago			X
2/26/68	FD 24759	CB&Q	23	1	Afternoon Zephyr	Chicago-Minneapolis		X(D)	
2/26/68	FD 24760	MILW	55-58	2		Chicago-Minneapolis			
2/29/68†	FD 24952	L&N	1-2	2		Nashville-Atlanta			X
3/ 1/68	FD 24766	MILW-SOO	9-49 48-10	2	Copper Country Ltd.	Milwaukee, Wis.-Calumet, Mich.	X	X	

Sheet No. Four of Four Sheets

Date of ICC Decision	Docket Number	Railroad	Trains	Actual No. of Trains Involved	Train Name	Terminii	Partial Discontinuance Applied For	Partial Discontinuance Granted	Complete Discontinuance Granted
3/ 1/68	FD 24773	ATSF	47-48	2	Oil Flyer	Kansas City-Tulsa			X
3/ 1/68	FD 24773	ATSF	211-212	2	Tulsan	Kansas City-Tulsa			
3/ 6/68†	FD 24970	UP	69-70	2		Kansas City-Salina, Kans.			X
3/11/68†	FD 24976	SCL	53-54	2		Florence, S. C.-Augusta, Ga.	X	X	
3/12/68	FD 24780	NYC	312-341	2	(Knickerbocker) (The Southwestern)	St. Louis-Indiana/Ohio State Line	X(L)	X(L)	
3/12/68	FD 24781	NYC	57-96	2		Chicago-Indiana/Ohio State Line	X(L)	X(L)	
3/12/68••	FD 24977	B&O	Consolidation of 37-40 with 51-52	2 Eliminated	Potomac Flyer	Washington, D. C.-Brunswick, Md.	X	X	
3/18/68†	FD 24984	IC	205-208	2	(Southwestern Ltd.) (Northeastern Ltd.)	Vicksburg, Miss.-Shreveport, La.	X(L)	X(L)	
3/19/68†	FD 24986	SOU	45-46	2	Tennessean	Chattanooga-Memphis	X(L)	X(L)	
3/21/68†	FD 24925	SOU	1-2	2	Ponce de Leon	Cincinnati-Atlanta		X	
3/28/68	FD 24818	ATSF	13-14	2	El Pasoan	El Paso, Tex.-Albuquerque, N. M.			X
4/ 2/68	FD 24821	CB&Q	35-36	2	Kansas City Zephyr	Chicago-Kansas City		X	
4/ 8/68†	FD 25028	PNYCTC	94-95	2	Kentuckian	Louisville, Ky.-Logansport, Ind.	X	X	
4/11/68	FD 24819	ATSF	9	1	Kansas City Chief	Chicago-Kansas City			X
4/11/68	FD 24819	ATSF	11	1	Kansas Cityan	Kansas City-Ft. Worth-Dallas			X
4/11/68	FD 24819	ATSF	12	1	Chicagoan	Dallas-Ft. Worth-Chicago			X
4/17/68†	FD 25041	SCL	3-4	2		Richmond-Atlanta	X	X	

Terminii	Partial Discontinuance Applied For	Partial Discontinuance Granted	Complete Discontinuance Granted
Kansas City-Tulsa			X
Kansas City-Tulsa			
Kansas City-Salina, Kans.			X
Florence, S. C.-Augusta, Ga.	X	X	
St. Louis-Indiana/Ohio State Line	X(L)	X(L)	
Chicago-Indiana/Ohio State Line	X(L)	X(L)	
Washington, D. C.-Brunswick, Md.	X	X	
Vicksburg, Miss.-Shreveport, La.	X(L)	X(L)	
Chattanooga-Memphis	X(L)	X(L)	
Cincinnati-Atlanta		X	
El Paso, Tex.-Albuquerque, N. M.			X
Chicago-Kansas City		X	
Louisville, Ky.-Logansport, Ind.	X	X	
Chicago-Kansas City			X
Kansas City-Ft. Worth-Dallas			X
Dallas-Ft. Worth-Chicago			X
Richmond-Atlanta	X	X	

† — Not investigated.

†† — ICC (Division 3) concluded not to investigate on date shown. Railroad's notice was later dismissed for lack of jurisdiction.

** — ICC (Division 3) concluded not to investigate on date shown. Subsequently, an investigation was instituted, but consolidation of the trains was permitted, pending service of a Commission report and order.

(R) — Report on reconsideration.

(L) — Final segment of a former through train. Other segments of the through train or service so marked had been discontinued since 1958.

(D) — Route of this train was not segmented by ICC's decision, but continuance of service was required by the Commission (Division 3) only on two days of the week. Train had previously operated daily.

When train name appears in parentheses, the name was no longer being used at the time of discontinuance.

Railroad Abbreviations as Used in Table.

ATSF — Atchison, Topeka & Santa Fe
B&M — Boston and Maine
B&O — Baltimore & Ohio
CB&Q — Chicago, Burlington & Quincy
C&EI — Chicago & Eastern Illinois
C&O — Chesapeake & Ohio
CRI&P — Chicago, Rock Island & Pacific
C&S — Colorado & Southern
D&RGW — Denver & Rio Grande Western
FRISCO — St. Louis — San Francisco
FW&D — Ft. Worth & Denver
GN — Great Northern
IC — Illinois Central
L&N — Louisville & Nashville
MILW — Chicago, Milwaukee, St. Paul & Pacific
MoP — Missouri Pacific
NP — Northern Pacific
N&W — Norfolk & Western
NYC — New York Central
PNYCTC — Pennsylvania New York Central Transportation Company
PRR — Pennsylvania Railroad
SCL — Seaboard Coast Line
SOO — Soo Line
SOU — Southern Railway
SP — Southern Pacific
UP — Union Pacific
WP — Western Pacific

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No. 1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF WILLIAMSPORT, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION OF PENN CENTRAL COMPANY TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, Penn Central Company, formerly The Pennsylvania Railroad Company, an intervening appellee, moves that the judgment of the District Court be affirmed on the ground that the question raised by appellants is so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal, filed March 4, 1968, from a judgment of a statutory three-judge District Court, refusing to enjoin, annul, or set aside orders of the Interstate

Commerce Commission entered May 3 and July 6, 1967, in Finance Docket No. 24398, *The Pennsylvania Railroad Company, Discontinuance of Trains 570 and 571 between Buffalo, New York and Baltimore, Maryland.* The reports and orders of the Commission were both by its Division 3. As yet, they have not been printed. They are attached to appellants' Jurisdictional Statement as Appendices C and D.

The proceedings before the Commission, from which the instant appeal arises, involved notices of the Railroad under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. 13a(1). These notices, posted and filed on December 7, 1966, proposed to discontinue Pennsylvania Railroad passenger trains 570 and 571, operating between Buffalo, N. Y. and Baltimore, Md., effective January 15, 1967.

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C., § 13a(1) was originally part of the Transportation Act of 1958.[1] This legislation resulted from the concern of the Congress about the financial plight of railroads and particularly the losses resulting from the operation of passenger trains. See 104 Cong. Rec. 10842, 10843, 10851-10854 (1958).

This section gives railroads the right to discontinue interstate passenger trains by serving a notice and supporting statement upon the Commission. Notices also must be posted in trains and in the stations involved. Further, the notices must be served upon the Governors and regulatory agencies of each state having jurisdiction over transportation, and upon representatives of the Post Office and Railway Labor. These procedures were followed in the instant case.

Prior to the expiration of the 30-days' notice, the Commission, in accordance with the statute, suspended the effective date of the notice for the maximum period of four months. Thereafter, hearings were held in Harrisburg,

1. 72 Stat. 568-574.

Williamsport, Olean, Buffalo and Washington, D.C. Later, on May 3, 1967, the Commission entered an order permitting the Railroad to discontinue passenger trains 570 and 571 between Buffalo and Harrisburg, but requiring the continued operation of those trains between Harrisburg and Baltimore.

A Complaint and Petition for a Temporary Restraining Order was then filed, on behalf of certain individuals, communities and organizations, with the United States District Court for the Middle District of Pennsylvania. A Temporary Restraining Order was entered by that court prohibiting the Railroad from discontinuing the trains between Buffalo and Harrisburg until such time as the plaintiffs (appellants here) had petitioned the Commission for reconsideration.[2] By order dated July 6, 1967, the Commission, through its Division 3, denied the petitions for reconsideration and affirmed its earlier order of May 3, 1967.

On August 2, 1967, the court below heard argument on appellants' request for an interlocutory injunction or temporary restraining order applicable to the Commission's final order of July 6, 1967. By a *per curiam* order filed August 3, 1967, the court below held irreparable damage had not been established and therefore the Commission's order should not be further stayed. The passenger trains were discontinued on August 4, 1967.

Thereafter, argument was heard on the merits. The appellants contended that if a railroad seeks to discontinue passenger trains over their entire run and so states in its notice, the Commission is without power to grant a partial discontinuance. It was their position that the only choice open to the Commission is to grant or deny the entire discontinuance.

---

2. This order remained in effect until August 3, 1967. City of Williamsport v. United States, 273 F. Supp. 899 (M.D. Pa. 1967).

After recognizing that the principal issue was whether the Commission had the power "to require operation of both trains in part from Baltimore to Harrisburg, thus allowing discontinuance of the remaining portion between Harrisburg and Buffalo," the court below concluded that there is nothing in the statute or in its legislative history suggesting the limitation which the appellants advanced. The court below also concluded that the Commission had not departed from the requirements of the law or abused its discretion in entering the orders which were the subject of the appeal. Therefore, the court below, without dissent, dismissed the complaint.

In their Jurisdictional Statement, the appellants request this Court to note probable jurisdiction and assign the matter for oral argument.

THE STATUTE INVOLVED

The issue before this Court involves an interpretation of Section 13a(1) of the Interstate Commerce Act. The appellants have printed this section in the Appendix to their Jurisdictional Statement.

ARGUMENT IN SUPPORT OF MOTION

The questions raised by the appellants here all relate to one basic issue: whether or not the Commission has the power under Section 13a(1) of the Act, to permit a railroad to discontinue passenger trains over a portion of their runs, when the notices filed and posted propose a discontinuance over their entire runs. Appellants contend the Commission may only consider the notice as filed and therefore must either permit or deny the entire discontinuance sought. This argument was rejected by the Commission, and the court below concluded that it is not in accord with the statute. It is submitted that a fair reading of the relevant statutory provision demonstrates that both the Commission and the court below were correct.

The statute gives to a railroad the right to notify the Commission and the public of its intention to discontinue a train "in whole or in part." After the Commission has considered: the notice, the railroad's statement in support of the discontinuance and any protests filed, the statute gives it the power to institute an investigation of the proposed discontinuance "in whole or in part," and to require the portion placed under investigation to be continued, *i.e.*, stayed, for four months beyond the noticed discontinuance date. Finally, after the investigation is concluded, the statute specifically authorizes the Commission to permit the discontinuance "in whole or in part," or to require the train or a portion thereof to be continued for one year.

There was good reason for the Congress to include the phrase "in whole or in part" three times in the statute. Many passenger trains operate over routes which extend beyond a thousand miles. The character of the trains and the areas they serve vary widely over such long routes. It may be that while there is no need for service

over the entire route, service is still required between local points. Similarly, the service needs between various couplets of cities along the route may be quite different from the requirements between the terminals.

The initiation of passenger service discontinuances is given to railroad management, and upon its appraisal of the circumstances, a determination is made as to whether a particular service should be discontinued "in whole or in part." Having reached its determination, the railroad submits its proposal to the Commission for approval. But the statute makes it plain that the Commission is not given the limited function of merely placing its imprimatur upon the railroad's proposal, or rejecting it. Rather, the Commission, after a preliminary review of the matter, including the protests of objectors, may approve it or may place the whole or a part of the railroad's proposal under investigation for further scrutiny. This, of course, is a sound procedure since it gives recognition to the varying service needs that are covered by the long-haul passenger trains. If nobody objects to the discontinuance, except between limited points along the route, and the Commission is convinced, by the railroad's supporting statement, that the discontinuance is manifestly proper—except for the portion to which objection has been taken—the dispute is narrowed. Therefore, only the portion of the service to which question exists is made the subject of hearing.

At the hearing, the issues are whether "public convenience and necessity" require the continuance of the service in dispute, and whether such continuance would "unduly burden interstate . . . commerce." In view of these statutory standards, it is obvious that the evidence submitted at the hearing may justify a discontinuance of part of the service under investigation and require that another part be continued; or the evidence may justify the discontinuance or continuance of all of such service. Because of this, the Com-

mission is given the power to require the continuance of the particular passenger service for one year "in whole or in part."

In summary, the three times inclusion of the phrase "in whole or in part" in the statute evidences a Congressional intent that the Commission's power is flexible and its approval or disapproval of a proposed passenger train discontinuance can be tailored to the needs of the public for a part, or all, of the service, weighed against the railroad's burden in maintaining the operation. Of necessity, such flexibility is dependent upon the right of the Commission to grant all or a portion of the service discontinuance proposed by the railroad. To restrict the Commission's power to the specific terms of the notice would utterly destroy the flexibility which is an inherent part of the pattern of regulation in this area.

The Commission has regularly and consistently interpreted Section 13a(1) of the Act in the same manner as it did here, and on several occasions has entered orders permitting the discontinuance of a passenger train over a portion of its route and requiring the continuance of service over another section.[3] An interpretation of a regulatory statute consistently followed by the administrative agency functioning under it, is entitled to great weight in the courts and should be followed except where clearly wrong—which is not so here.[4]

The other arguments in the Jurisdictional Statement also are basically related to the statutory interpretation issue. Appellants' contention that the Commission did not

3. Boston & Maine Corp. Discontinuance of Service, 324 I.C.C. 418 (1965); Chicago, M. St. P.&P.R. Co. Discontinuance of Service, 317 I.C.C. 691 (1961); Louisville & N.R. Co. Discontinuance of Service, 307 I.C.C. 173 (1959); New York Central R. Co. Discontinuance of Service, 307 I.C.C. 167 (1959).

4. See Power Reactor Co. v. Electricians, 367 U.S. 396, 408; County of Marin v. United States, 356 U.S. 412, 420.

make the necessary statutory findings is with reference to findings for the operation of the trains over their entire run. The Commission made separate findings applicable to the Buffalo-Harrisburg portion of the run, and separate findings applicable to the Harrisburg-Baltimore segment. Together, these findings constitute findings for the entire run of the trains. But because of the quite different character of the trains and the traffic handled over the two sections, the Commission of necessity had to make findings for the northern segment that differed completely from the findings which the facts compelled for the southern segment. Specifically, the Commission found that public convenience and necessity did *not* require the trains to be continued between Harrisburg and Buffalo, and that such continued operation would unduly burden interstate commerce. By contrast, the Commission specifically found that public convenience and necessity required the trains be continued between Baltimore and Harrisburg and that the continued operation would *not* unduly burden interstate commerce. Since, as the court below held, the facts supported these completely opposite findings of the Commission, if its order was to be supported by the findings of facts, it had to permit the discontinuance of the trains north of Harrisburg and require their continuance south of Harrisburg.[5]

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5. See Southern R. Co. v. North Carolina, 376 U.S. 93, 99-101. While admitting the Commission has power to allow the discontinuance of "so-called unprofitable trains," appellants infer in their Jurisdictional Statement that the discontinued trains are profitable. This is not true. The direct operating costs for trains 570 and 571 exceed the revenues they earn. This is so for the entire run, as well as any part of it. Appellants' arguments are based upon an accounting theory which adds to the revenues of the specific trains involved the earnings from the transportation of passengers, mail and express transported on connecting trains. The Commission considered this argument and found that even if the revenues from connecting trains were added to the earnings of the northern segment of trains 570 and 571, those trains would still be operated at a deficit. Jurisdictional Statement App. D at 38a.

This appeal is essentially concerned with a single issue of statutory interpretation. There is no ambiguity in the statute for it specifically confers upon the Commission power to permit proposed passenger train discontinuances in whole or in part. Since the Commission in this instance, as it has consistently done in the past, permitted a discontinuance of a part of a passenger service upon adequate findings of facts, satisfying the relevant statutory standards, this Court should grant the motion to affirm the judgment of the court below, which refused to set aside or enjoin the Commission's order.

THE RELIEF REQUESTED

It is most respectfully submitted that the issue here is not of such substance or of such importance as to require further argument. The judgment of the District Court, therefore, should be affirmed.

Respectfully submitted,

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Of Counsel:

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PROOF OF SERVICE

I, CARL HELMETAG, JR., one of the attorneys for Penn Central Company, an intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1968, I served copies of this Motion to Affirm on the several parties as follows: (1) on the United States by mailing copies thereof in a duly addressed envelope, with postage prepaid, to the Hon. Ramsey Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; (2) on the United States by mailing copies in a duly addressed envelope, with postage prepaid, to the Hon. Erwin N. Griswold, The Solicitor General, Department of Justice, Washington, D. C.; (3) on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with postage prepaid, to Hon. Robert W. Ginnane, its General Counsel, at the Offices of the Commission, Washington, D. C.; (4) on the other parties by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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CARL HELMETAG, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1401

CITY OF WILLIAMSPORT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment and decision of a three-judge district court (J.S. 3a–9a) dismissing appellants' suit to set aside a report and orders of the Interstate Commerce Commission (J.S. 10a–43a) which required the Pennsylvania Railroad Company to continue operating passenger trains 570 and 571 between Harrisburg, Pa. and Baltimore, Md.

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(the southern segment), but permitted the discontinuance of the operation of those trains between Harrisburg, Pa. and Buffalo, N.Y. (the northern segment).

In December 1966, the railroad filed notice pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)) (J.S. 1a–2a) proposing the complete discontinuance of trains 570 and 571 operating between Baltimore, Md. and Buffalo, N.Y. The Commission instituted an investigation and, after hearings held in Harrisburg and Williamsport, Pa., Olean and Buffalo, N.Y., and Washington, D.C., found that continued operation of the northern segment was not required by the public convenience and necessity and would unduly burden interstate commerce.[1] Contrary findings were made as to the southern segment and the railroad was ordered to continue the operation of that segment for one year.

Appellants brought the present action to annul and set aside the Commission's orders, asserting on various ground that the Commission was powerless to require a partial continuance where the railroad's notice proposed a complete discontinuance, but was obligated to make findings and issue an order requiring continuance (or permitting discontinuance) as to the operation of the trains in their entirety. The court below unanimously sustained the Commission's decision, holding that the Commission is not limited by

[1] The operation of the northern segment was discontinued in August 1967, when the court below declined to extend the temporary restraining order it had previously entered, finding that appellants had failed to establish irreparable injury.

the railroad's original notice, but may order a partial continuance where a complete discontinuance is sought, and that the Commission's action was supported by its findings.

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. Whatever the regulatory problems in train discontinuance cases—and there are many—they are not presented here. This case involves only the question whether the Commission is so bound to the railroad's notice that it cannot require continuance of part of the operation sought to be discontinued. The court below noted that the Act specifically contemplates an order requiring continuance "in whole or in part"; and properly gave great weight to a pattern of consistent—and virtually contemporaneous—administrative interpretation serving as precedent for the result reached here.[2] As the court stated (J.S. 7a), appellants' theory that the Commission is restricted by the scope of the discontinuance sought in the original notice and cannot order a partial continuance—

> * * * would place the Commission in an administrative strait-jacket and would not comport with the statutory purpose. Its effect would be to penalize the railroad for seeking

[2] See *New York Central R. Co. Discontinuance of Service*, 307 I.C.C. 167, 171 (1959); *Louisville & Nashville R. Co. Discontinuance of Service*, 307 I.C.C. 173, 186 (1959); *Chicago, M., St. P. & P. R. Co. Discontinuance of Passenger Train Service*, 317 I.C.C. 691, 715–716 (1961); *Boston & Maine Corp. Discontinuance of Passenger Train Service*, 324 I.C.C. 418, 445–446 (1965).

> to discontinue more of the operation than the Commission ultimately decided it was proper to do. There is nothing in the statute or legislative history suggesting such a limitation. * * *

No different result is required merely because, as here, a slight profit as a whole might have been shown through attribution of "feeder" revenue,[3] since such a showing, by itself, would not have compelled the ultimate findings that the continued operation of the trains in their entirety was required by the public convenience and necessity and would not unduly burden interstate commerce. It is undisputed that the northern segment operated at a loss of some $233,000, and the statute explicitly authorizes a continuance "in part" without any requirement as to the "whole." This is consistent with prior decisions in rail abandonment cases. *E.g., State of North Carolina* v. *United States,* 124 F. Supp. 529 (M.D.N.C., 1954), sustaining *Norfolk S. Ry. Co. Abandonment,* 290 I.C.C. 268; *State of Georgia* v. *United States,* 28 F. Supp. 749, 752 (E.D. Va., 1939). Moreover, the fact that an entire train may show a profit does not preclude discontinuance, even as to the whole. *People of the State of California* v. *United States,* 258 F. Supp. 950 (N.D. Calif., 1966). There is thus no reason for the agency to make needless findings as to the whole train, where, as here, it is apparent in the course of examining the entire operation that one segment is not heavily patronized, loses money under any view, and is clearly severable. Finally, there are but few cases involving

[3] Feeder revenue is a portion of revenue earned by other trains of the carrier connecting with the train in issue.

an unprofitable segment of a train arguably profitable as a whole wherein the railroad seeks a complete discontinuance; the situation is unlikely to recur with any frequency.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JUNE 1968.

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No. 1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF WILLIAMSPORT, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Pennsylvania

REPLY TO MOTIONS TO AFFIRM

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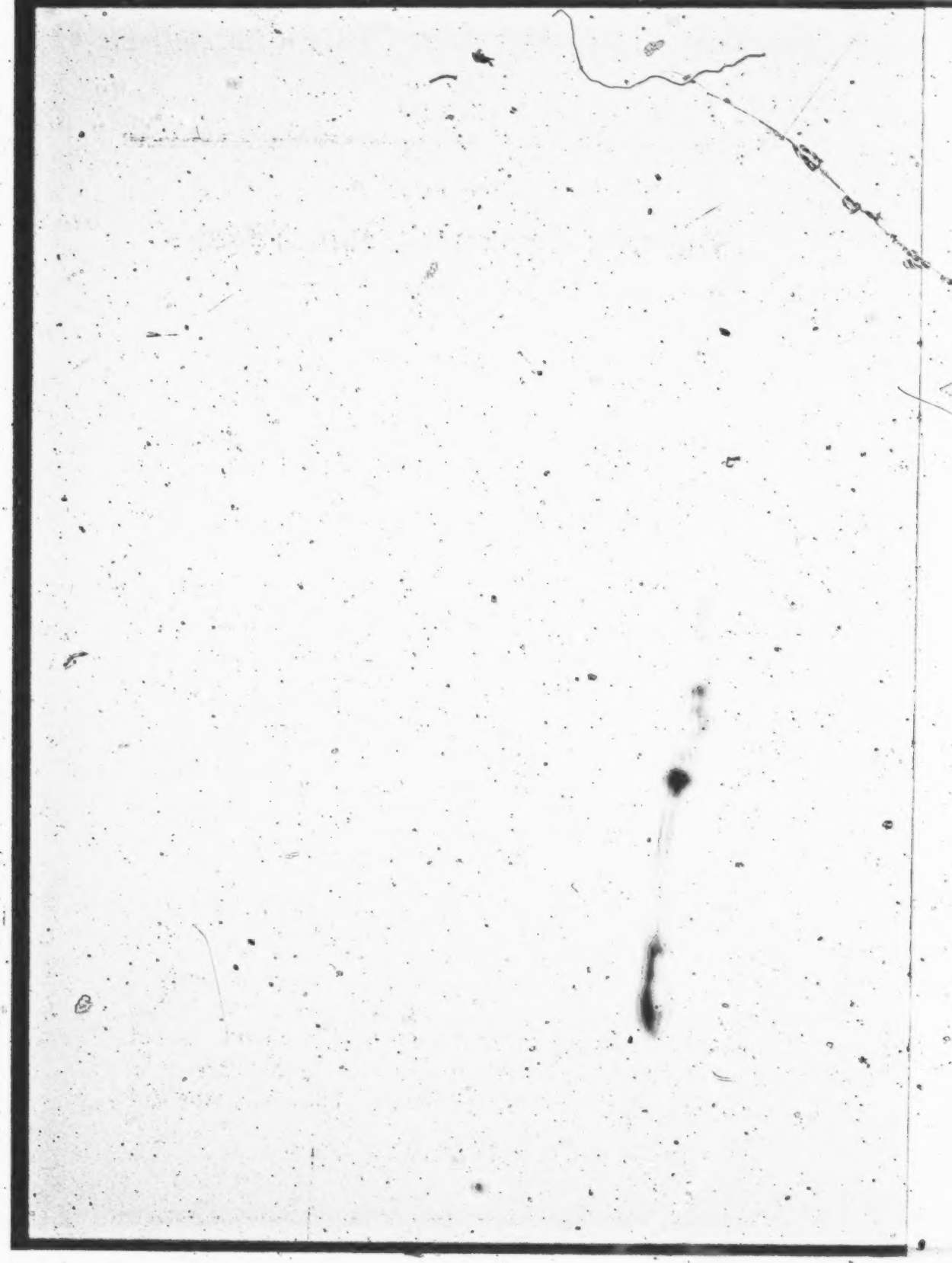

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---

REPLY TO MOTIONS TO AFFIRM

Appellants submit this reply to the motions to affirm filed by the United States and by Penn Central Company.

1. The decision below, sustaining the refusal of the agency to render statutory findings on the entire run of a passenger train or to even consider the impact from the discontinuance of a portion of a train's run upon the viability of the remaining segment, is not validated by reference to four prior agency decisions removing trains in this manner.[1] The issue was not

[1] U.S. Motion, p. 3, fn. 2; PC Motion, p. 7, fn. 3.

actively contested in those cases, and the discontinued segment received very little patronage.[2] In each case, the train was subsequently further segmented or discontinued completely, illustrating the futility of this administrative practice from the standpoint of the public.[3] Indeed, the very Buffalo-Baltimore night trains relied upon by the majority of the Commission's Division 3 to serve these Pennsylvania communities (J.S., p. 26a), were recently segmented with the Harrisburg-Baltimore portion now discontinued.

2. The statute directs the Interstate Commerce Commission to institute an investigation into the proposed discontinuance specified by the carrier's notice, without the "in whole or in part" proviso which Penn Central would infer,[4] and requires quasi-jurisdictional findings concerning such notice before the investigation may be discontinued.

3. The regulatory problems in train discontinuance cases basically stem from the technique of the "partial" discontinuance, a device whereby the Interstate Commerce Commission closes its eyes to the entire run of a train, even if profitable, as here.[5] The importance

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[2] In constrast, of the 43 protestant witnesses in the agency proceeding below, 42 desired continuance of the Buffalo-Harrisburg segment, whereas only 1 preferred the Harrisburg-Baltimore service; Passenger utilization for the discontinued northern segment is twice that for the continued southern segment.

[3] See: *Louisville & N.R. Co. Discontinuance of Trains*, 320 I.C.C. 669 (1964); *Chicago, M. St. P. & P.R. Co. Discontinuance of Service*, 320 I.C.C. 566 (1964); The NYC and B&M trains were made subject to State action.

[4] PC Motion, p. 5.

[5] Appellants do not concede that the northern segment, standing alone, operated at a loss as suggested by the United States in its Motion, p. 4. See dissent of Commissioner Virginia Mae Brown (J.S., p. 32a).

of this case, involving the first appeal to reach this court since enactment of the statute, is further indicated by the fact that the agency has twice relied upon the opinion below in segmenting trains in the short period since March 4, 1968.[6]

The Motions to Affirm should be denied, and the appeal given plenary consideration on the merits.

Respectfully submitted,

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[6] See: *Chicago, B. & Q. R. Co. Discontinuance of Trains*, 331 I.C.C. 813, 827 (4/2/68); *Illinois Central R. Co. Discontinuance of Trains*, 333 I.C.C. 149, 174 (5/14/68).

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June 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CITY OF WILLIAMSPORT ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 1401. Decided June 17, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.